

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF TEXAS

3 THE HONORABLE ANDREW S. HANEN, JUDGE PRESIDING

4 UNITED STATES OF AMERICA,) No. 4:22-cr-612
5 Plaintiff,)
6 vs.)
7 EDWARD CONSTANTINESCU,)
et al.,)
8 Defendants.)

10 PRETRIAL CONFERENCE - DAY 2

11 OFFICIAL COURT REPORTER'S CERTIFIED TRANSCRIPT

12 Houston, Texas

13 March 20, 2024

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4 Southern District of Texas

6 **Proceedings recorded by mechanical stenography.**
7 **Transcript produced by Reporter on computer.**

1 **PROCEEDINGS**
2

3 (The following proceedings held in open court.)
4
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10:02:57 7 THE COURT: All right. Be seated. Okay.

10:03:01 8 I want to start on exhibits.

10:03:05 9 Before I do that, it was requested, I
10:03:09 10 think by the defendants, that I provide at least my
10:03:19 11 thinking of what a charge would look like, and I'll
10:03:24 12 probably have that for you tonight. I'm not bound by
10:03:26 13 anything I'm giving you, but it's my -- it will be my
10:03:32 14 version -- I've looked at both what the government has
10:03:36 15 submitted and the defendants have submitted
10:03:40 16 request-wise and incorporated large portions of both.10:03:45 17 But, anyway, you asked for it. I will
10:03:49 18 give it to you. Obviously, when I was doing the
10:03:53 19 charge, it was probably obvious from yesterday's
10:03:59 20 hearing, it was one of the things that got me
10:04:04 21 reintroduced in the motion to dismiss filed by
10:04:10 22 Mr. Rybarczyk after having looked at the charge, and
10:04:17 23 I'm still interested in that. But I will give you
10:04:20 24 that, hopefully, before you go home today; and if not,
10:04:23 25 we'll get it to you tomorrow.

10:04:25 1 All right. I would like to start with the
10:04:31 2 government's exhibits. And I'm just going to go right
10:04:36 3 down the line and see where we have objections and see
10:04:42 4 where we don't.

10:04:46 5 I have my list of the government's
10:04:49 6 exhibits, basically has 340 exhibits.

10:05:22 7 Government's 1, I think we've talked
10:05:26 8 about. And I'm admitting Government's 1 subject to
10:05:32 9 the objections I sustained yesterday. You know, no
10:05:41 10 SEC most wanted, no hand gestures to the camera. But
10:05:49 11 other than that, it's admitted.

10:05:52 12 MS. CORDOVA: Your Honor?

10:05:54 13 THE COURT: Yes.

10:05:55 14 MS. CORDOVA: On Government Exhibit 1,
10:05:56 15 there is a post from Dan Knight, who is a government
10:06:01 16 witness. He will not be a defendant in this case.
10:06:03 17 And he posted --

10:06:04 18 THE COURT: He is a defendant in this
10:06:06 19 case.

10:06:06 20 MS. CORDOVA: But he won't be a defendant
10:06:08 21 in front of the jury.

10:06:11 22 THE COURT: He won't be?

10:06:13 23 MS. CORDOVA: No, he's pleaded guilty.

10:06:15 24 THE COURT: Oh, I understand that. We
10:06:16 25 don't expect Mr. Knight to testify?

10:06:18 1 MS. CORDOVA: He will be testifying.

10:06:20 2 THE COURT: Okay.

10:06:21 3 MS. CORDOVA: Yes, Your Honor. Sorry that

10:06:22 4 wasn't clear.

10:06:24 5 The posted issue -- and I just want to be

10:06:27 6 clear that this is covered under the Court's ruling.

10:06:29 7 He took a selfie of himself with Mr. Hennessey and

10:06:33 8 Mr. Matlock behind him and posted it apparently on

10:06:36 9 Twitter with the -- with the language "pumpers,"

10:06:40 10 that's it, just "pumpers." There's no evidence that

10:06:44 11 Mr. Hennessey ever saw it, that Mr. Hennessey liked

10:06:47 12 it, that Mr. Hennessey approved it.

10:06:49 13 THE COURT: I'll sustain that.

10:06:50 14 MS. CORDOVA: Thank you.

10:06:51 15 THE COURT: Take out the word "pumper."

10:07:03 16 All right. Now, on page 1 of the

10:07:03 17 government's exhibits, then the next exhibits start

10:07:06 18 with 2A and they go through 5B.

10:07:07 19 Are there any objections to any of those?

10:07:09 20 MR. FORD: Yes, Your Honor. We'll start

10:07:20 21 with the series 2 exhibits, which refer to Onconova

10:07:26 22 Therapeutics, ONTX, between July 16th and August 26th

10:07:31 23 of 2020. That is a substantive count against --

10:07:35 24 charged against my client, Mr. Constantinescu. We are

10:07:38 25 having some technical difficulties.

10:07:41 1 The first question is whether we've gotten
10:07:42 2 those resolved.

10:08:01 3 Sounds like we've got it working. So
10:08:03 4 while we get that situated --

10:08:04 5 THE COURT: If you want me to look at
10:08:06 6 something, it's not working up here.

10:08:10 7 MR. FORD: Do we have paper copies of the
10:08:12 8 exhibits?

10:08:14 9 THE COURT: We can get them, I guess.

10:08:56 10 What are we looking at, Mr. Ford?

10:08:58 11 MR. FORD: Exhibit 2A.

10:09:00 12 THE COURT: Okay.

10:09:02 13 MR. FORD: It purports to be a chart of
10:09:07 14 trading price and volume of ONTX. So we have multiple
10:09:17 15 issues with this. One is we don't know who created
10:09:19 16 it. There is an authenticity issue.

10:09:23 17 The other sort of concern with this series
10:09:25 18 of exhibits, the government just appears to have
10:09:34 19 chopped a section of trading to support their
10:09:40 20 ambiguous causation correlation theory that they plan
10:09:43 21 to present to the jury, while claiming they're not
10:09:46 22 going to present it.

10:09:47 23 The only function of this chart would be
10:09:49 24 to suggest that the stock went up and down and the
10:09:51 25 defendants were somehow the cause of it.

10:09:55 1 This is an ongoing violation of *Brady v.*
10:10:00 2 *Maryland* under the United States Constitution. We
10:10:02 3 have strong reason to believe that the government has
10:10:05 4 in their possession documents that suggest that to the
10:10:09 5 extent the price was artificially inflated or that it
10:10:13 6 dropped on August 24th, it was not caused by any of
10:10:16 7 the individuals in this room, but other easily
10:10:20 8 identifiable individuals.

10:10:21 9 And they have failed to produce that
10:10:26 10 *Brady*, but as far as the functional objection, we'll
10:10:29 11 pull up to show our Defendant's Exhibit 1102, which we
10:10:36 12 will seek to have admitted. It's an actual chart that
10:10:42 13 was not created in the ordinary course of business.
10:10:45 14 We obtained it off Yahoo! Finance. It's easily
10:10:48 15 authenticated and admissible.

10:10:51 16 You can see that this stock, like every
10:10:53 17 other stock in the stock market, goes up and down over
10:10:57 18 time. If we zoomed out even further, you just -- the
10:11:00 19 stock goes up and down.

10:11:01 20 And so what they've done is they've
10:11:04 21 chopped out a section to make it appear as if the
10:11:08 22 stock went up and down on this individual occasion,
10:11:11 23 and that was caused somehow by the tweeting of my
10:11:14 24 client.

10:11:17 25 We can pull up his trade records as well.

10:11:23 1 We've filtered the Excel spreadsheet. You can see
10:11:27 2 that as early as March 19, 2020, that's as far back as
10:11:35 3 the records go that the government provided us, but I
10:11:37 4 have reason to believe that my client traded ONTX
10:11:40 5 stock long before March 7th, 2019.

10:11:41 6 You can see he was trading it in 2019.

10:11:44 7 We'll scroll down. He continued -- he traded it all
10:11:45 8 through 2019, through the entire year. Continued to
10:11:50 9 trade it through January of 2020. And then you can
10:11:52 10 see right there that he also traded it --

10:11:56 11 THE COURT: Well, let me get back to
10:11:58 12 actual objections, and the fact you disagree with the
10:12:04 13 exhibit or you think it's prejudicial is not an
10:12:06 14 objection to admissibility. I mean, quite frankly,
10:12:11 15 there shouldn't be any exhibit that doesn't prejudice
10:12:14 16 one side or the other, or they wouldn't be relevant.

10:12:20 17 Now, the authenticity -- easy for me to
10:12:26 18 say -- whether it can be authenticated or not is a
10:12:30 19 different question.

10:12:33 20 Who's going to answer that for the
10:12:34 21 government?

10:12:35 22 MR. FORD: So -- and, Your Honor, just to
10:12:36 23 be clear, we are objecting on authenticity grounds
10:12:40 24 because we don't know who made this chart, and it's
10:12:45 25 testimonial in nature.

10:12:46 1 MR. LIOLOS: Good morning, Judge. John
10:12:48 2 Liolos for the United States.

10:12:49 3 So Mr. Melley made these charts. We've
10:12:52 4 disclosed that to Mr. Ford. He made them from
10:12:57 5 Bloomberg data of the price and volume of the stocks
10:12:59 6 at issue that he got from Bloomberg. This is a 1006
10:13:03 7 summary chart summarizing that voluminous data.

10:13:07 8 They can cross-examine Mr. Melley on all
10:13:10 9 his charts. It provides critical context. It's
10:13:14 10 around the trading window. And another thing that it
10:13:16 11 provides is context for the price targets the
10:13:21 12 defendants are constantly shouting out. And it shows
10:13:23 13 that, within these windows, the price more often than
10:13:27 14 not comes nowhere near the targets they're talking
10:13:29 15 about.

10:13:30 16 THE COURT: If Mr. Melley gets up and
10:13:31 17 testifies to that, Mr. Ford, do you still have an
10:13:35 18 objection?

10:13:36 19 MR. FORD: Not to authenticity, no.

10:13:39 20 THE COURT: Okay. Well, we're going to
10:13:43 21 defer on Number 1 till Mr. Melley testifies. I mean,
10:13:46 22 number 2A, I'm sorry.

10:13:50 23 MS. CORDOVA: Your Honor, we would also
10:13:51 24 object on relevance grounds on the basis that it's
10:13:54 25 just irrelevant what happened to the price. Because

10:13:56 1 they haven't alleged that our clients were responsible
10:14:00 2 for a pump and dump, but they're trying to show it
10:14:03 3 through this chart.

10:14:06 4 THE COURT: What relevance do we have
10:14:08 5 here?

10:14:08 6 MR. LIOLOS: Well, first of all, Your
10:14:10 7 Honor was talking yesterday about the context.
10:14:12 8 They're not just trading in the ether. The jury needs
10:14:16 9 some sort of context for what the stock was doing in
10:14:18 10 the trading window that all the trading that was
10:14:20 11 happening is -- we're talking about.

10:14:21 12 And, secondly, specifically to the price
10:14:23 13 targets, I think it's highly relevant to the
10:14:27 14 reasonableness of the price targets that they're
10:14:33 15 touting.

10:14:33 16 THE COURT: You guys know the facts. Tell
10:14:35 17 me, what dates are we interested in in this chart? We
10:14:38 18 have a two-month chart.

10:14:40 19 MR. FORD: So Mr. Constantinescu first
10:14:42 20 purchased the stock July 16, 2020. He then held the
10:14:50 21 stock for two weeks. He sold a portion of his
10:14:53 22 position on July 29th, two weeks later. He had closed
10:14:57 23 out his position on August 14th, 2020. You can see
10:15:03 24 the stock was flat during that time.

10:15:04 25 And then on August 24, Mr. Constantinescu

10:15:11 1 purchased and sold approximately 60,000 shares of ONTX
10:15:14 2 stock. You will see that the trading volume of the
10:15:15 3 24th was over 180 million shares. That means 180
10:15:20 4 million buy and sell orders. The notion that the
10:15:23 5 buying and selling of 60,000 shares could have
10:15:25 6 impacted the stock price is absurd.

10:15:30 7 And what we believe Mr. Melley plans to do
10:15:33 8 on the stand is suggest that this was a pump and dump
10:15:35 9 and that somehow my client's selling of 60,000 shares
10:15:39 10 would have influenced the price, when 180 million
10:15:43 11 shares sold that day. Just to be clear, it's
10:15:46 12 180 million over a six and a half hour trading day.

10:15:51 13 There's more than 60,000 shares there for
10:15:55 14 probably trading every minute. It's impossible or
10:15:57 15 inconceivable that his actions affected the stock
10:16:00 16 price.

10:16:00 17 So we are concerned because we understand
10:16:02 18 what they're going to do with this chart is they're
10:16:04 19 going to put it in front of Mr. Melley and say, look,
10:16:07 20 this is a pump and dump. The stock went up and down,
10:16:10 21 and he bought it and sold it on these dates.

10:16:12 22 It is not a realistic or feasible
10:16:15 23 causation argument, and we have a fear that it will be
10:16:19 24 presented to the jury in that way.

10:16:24 25 MR. LIOLOS: Mr. Melley is not going to

10:16:26 1 talk about any of the defendants' trading
10:16:28 2 specifically. He's just giving context to the trading
10:16:30 3 in the stock during and around the window.

10:16:33 4 THE COURT: Well, I think most of your
10:16:34 5 arguments go to the, you know, cross-examination and
10:16:38 6 the merits. It's not whether it's coming in or not.

10:16:41 7 MR. MURTHA: If I can add in, Your Honor.
10:16:41 8 Mr. Murtha on behalf of Mr. Hennessey.

10:16:42 9 The chart also goes beyond the period that
10:16:45 10 the government has charged in the episode. So
10:16:51 11 Government Exhibit 2B has a date frame from July 16,
10:16:56 12 2020, to August 26, 2020. But Government's Exhibit 2A
10:17:01 13 expands that episode, outside of what they chose, to
10:17:03 14 July 1st, 2020, to August 31st, 2020. So the chart
10:17:10 15 should at least be limited down to what they've
10:17:13 16 actually alleged to include the time frame for the
10:17:16 17 allegedly fraudulent statements. They're trying to
10:17:19 18 have it both ways.

10:17:20 19 MR. LIOLOS: Your Honor, we're going to be
10:17:22 20 arguing about the reasonableness of the price targets
10:17:24 21 that they're saying. And they're going to be pointing
10:17:26 22 out, well, it could have gone up. It could have hit
10:17:28 23 that. And these show even, you know, a week or two
10:17:31 24 outside the --

10:17:31 25 THE COURT: I think that goes to

10:17:32 1 cross-examination, not to admissibility. And if
10:17:43 2 that's -- I mean, are these going to be the objections
10:17:45 3 to -- do I have a series of these?

10:17:46 4 MR. LIOLOS: Yes, Your Honor.

10:17:48 5 MR. FORD: Your Honor, just to be clear,
10:17:51 6 to the extent you're willing to admit them, we don't
10:17:54 7 need to spend all day on this. And it is going to
10:17:56 8 appear as 2A, 3A, 4A throughout. So that -- you know,
10:18:00 9 that's why we're raising it now as we are. We'll get
10:18:04 10 a decision and then we'll move on. It's going to
10:18:07 11 cover, you know, 50 so exhibits.

10:18:10 12 THE COURT: Okay.

10:18:10 13 MS. EPLEY: If I may briefly.

10:18:11 14 If you're about to make a ruling in
10:18:13 15 regards to the stock A charts comprehensively, what I
10:18:13 16 would also point out to the Court -- stock A charts,
10:18:23 17 so 2A, 3A through 20A and further.

10:18:27 18 In this scenario, the government has
10:18:30 19 provided a broader window than the trading window, as
10:18:32 20 you've already been told. But in other examples they
10:18:35 21 provide clipped windows. So even less than the
10:18:37 22 trading window as they established it. Because it
10:18:40 23 fits a narrative or an optic that suits them.

10:18:44 24 And so as you make this ruling, I would
10:18:46 25 ask that all stocks at least include the full trading

10:18:48 1 window as prescribed by the government.

10:18:51 2 THE COURT: Okay. Mr. Ford, did you have
10:18:54 3 something you wanted to add? I'm sorry.

10:18:59 4 Mr. Williams.

10:18:59 5 MR. WILLIAMS: Williams.

10:19:02 6 THE COURT: Williams.

10:19:04 7 MR. WILLIAMS: The only thing I was going
10:19:05 8 to point out was to answer your question about whether
10:19:08 9 you were going to be doing a lot of these -- the only
10:19:12 10 thing I was going to point out was to answer your
10:19:14 11 question about whether you were going to be dealing
10:19:15 12 with a lot of these. Essentially, the A exhibit, 2A
10:19:20 13 through at least 30-some-odd A --

10:19:28 14 MR. LIOLOS: 37, I think?

10:19:30 15 MR. WILLIAMS: 37A. These are
10:19:30 16 characterized as FINRA price volume charts. So 37
10:19:34 17 times, Your Honor, at least to answer your question,
10:19:35 18 and it's usually the A exhibit in the government's
10:19:39 19 exhibit protocol.

10:19:41 20 THE COURT: Okay. All right. Well, I am
10:19:44 21 certainly allowing y'all to cross-examine whoever the
10:19:47 22 government's witness on, you know, why he did one
10:19:51 23 chart that's a month long and why he did one chart
10:19:54 24 that's two months long or three months long. I mean,
10:19:57 25 I think you can do that, but I'm not sustaining the

10:20:02 1 objections because of that.

10:20:03 2 So we're assuming Mr. Melley can
10:20:08 3 authenticate all of these. I'm going to admit all of
10:20:13 4 these, and overrule those objections.

10:20:19 5 MR. LIOLOS: Thank you, Judge. And I did
10:20:21 6 just want to make clear for the record as to
10:20:23 7 Mr. Ford's *Brady* point. These are all within, you
10:20:27 8 know, charts of the trading episodes to which we made
10:20:30 9 the *Brady* request to the SEC and FINRA.

10:20:33 10 THE COURT: Okay. All right. Does that
10:20:38 11 take me all the way to 38?

10:20:40 12 MR. FORD: So there's a series. With
10:20:44 13 regards to 2B, it's the charts of Garibotti. We
10:20:47 14 obviously renew all of our objections that were raised
10:20:50 15 yesterday with regards to those charts, including the
10:20:54 16 fact that they summarize something other than what
10:20:56 17 they purport to summarize.

10:20:58 18 Issues with the color coding, the labeling
10:21:03 19 of falsity, all those sort of things, and that's going
10:21:06 20 to appear on Exhibit 2B throughout, we would request
10:21:09 21 that we defer the determination about preadmission
10:21:13 22 until the government has revised these charts to
10:21:16 23 comply with the Court's rulings yesterday.

10:21:20 24 THE COURT: Okay. Help me here. Which --
10:21:25 25 which exhibits are we talking about?

10:21:26 1 MR. FORD: So go to -- if you go --
10:21:28 2 THE COURT: No, I understand the color
10:21:29 3 coding and I ruled on that yesterday. We're not
10:21:32 4 having any commentary. We're not have any color
10:21:35 5 coding that indicates false or not false. I mean,
10:21:39 6 those are --

10:21:42 7 MR. FORD: They put them as Exhibit 2B,
10:21:46 8 3B, 4B, 5B, et cetera. And so we're pulling one up
10:21:51 9 just as an example. This is 2B.

10:21:58 10 Because the government is going to be
10:22:00 11 making modifications, we would just request that we
10:22:02 12 defer preadmission until they've made the
10:22:04 13 modifications to the extent Your Honor has ruled that
10:22:06 14 these are admissible. Once we've reviewed the
10:22:12 15 modifications to make sure they comply with Your
10:22:17 16 Honor's suggestions, then we will, you know -- that
10:22:19 17 will be that.

10:22:20 18 THE COURT: All right. Let's try to
10:22:23 19 get -- Mr. Armstrong, you and Mr. Liolos, let's try to
10:22:27 20 get these revised charts to them ASAP.

10:22:31 21 MR. ARMSTRONG: Your Honor, the bigger
10:22:34 22 issue is the admissibility of documents themselves.
10:22:37 23 Are they proper summaries? Which we contend they are.
10:22:43 24 Do they properly summarize the defendants'
10:22:46 25 misstatements? Which we contend that they do.

10:22:48 1 So those are the bigger issues that need
10:22:49 2 to be resolved. We can resolve the minor nits here
10:22:52 3 and there about the actual content.

10:22:54 4 THE COURT: I've not heard an objection to
10:22:55 5 the content other than the prejudicial content that I
10:23:01 6 thought was sustainable.

10:23:04 7 MR. FORD: Your Honor, the only other
10:23:06 8 thing from our perspective, and I'll let everybody
10:23:11 9 else talk, is there is data that this purports to
10:23:15 10 summarize. Those include the actual trade records,
10:23:19 11 the actual tweets or conversations. We would just
10:23:22 12 request that, to the extent this is going to be
10:23:25 13 authenticated and pre-admitted, that all of the
10:23:27 14 underlying data is authenticated and pre-admitted as
10:23:30 15 well. In other words, I would like to be able to use
10:23:33 16 his actual trade records on cross.

10:23:37 17 THE COURT: Yes, I'm assuming that.

10:23:40 18 MR. FORD: Thank you.

10:23:43 19 THE COURT: Mr. Ford, remind me of that,
10:23:45 20 though, when we get there.

10:23:46 21 MR. ROSEN: The main objection -- we're
10:23:49 22 not going to go back to the color coding -- was just I
10:23:52 23 don't know if Your Honor gave a ruling on the profits
10:23:54 24 issue about the relevancy of their -- they've
10:23:57 25 calculated total profits from trading in that time

10:24:01 1 period. But they have -- what they haven't done is
10:24:03 2 narrow that to any profits derived from the alleged
10:24:07 3 fraud.

10:24:08 4 And for us, that's obviously extremely
10:24:10 5 problematic, just because it juices the numbers up
10:24:14 6 extremely substantially. We obviously don't believe
10:24:15 7 that there is any fraud, but it also prevents us from
10:24:20 8 sort of cross-examining as to what any impact the
10:24:23 9 trading had on any of the markets, as well as the
10:24:25 10 tweeting. And also to determine for purpose of
10:24:28 11 Rule 29 --

10:24:29 12 THE COURT: Show me an example.

10:24:31 13 MR. ROSEN: Okay. The first page of 2B,
10:24:34 14 the very cover page.

10:24:38 15 THE COURT: Okay.

10:24:39 16 MR. ROSEN: So if you look up at the 1, 2,
10:24:42 17 3, 4, 5, 6, 7 columns, so it goes, you know, name,
10:24:50 18 Twitter handle, Discord handle, Twitter posts, Discord
10:24:54 19 posts, number of shares bought, number of shares sold.
10:24:56 20 Generally no objection beyond yesterday.

10:24:59 21 We're talking about the last column, the
10:25:04 22 profit. It says, first in, first out. Now, the
10:25:08 23 numbers there, the government -- I don't think there's
10:25:11 24 any dispute on this. They're not numbers indicating
10:25:15 25 what the government believes are fraudulent proceeds

10:25:18 1 at all.

10:25:20 2 They're total trading profits during the
10:25:23 3 arbitrarily chosen episode dates. So we're on trial
10:25:27 4 for securities fraud. The numbers are not proceeds of
10:25:33 5 securities fraud. There is no relation between the
10:25:36 6 profits that they've chosen and what we're actually on
10:25:39 7 trial for. So it's a pure relevancy objection. It's
10:25:43 8 extreme prejudice, because it makes it appear -- this
10:25:46 9 example, you know, my clients actually lost money.
10:25:49 10 So, you know, that's fine.

10:25:50 11 But Mr. Constantinescu had, you know, made
10:25:53 12 \$300,000, but not from fraud. And that's the problem.
10:25:57 13 It makes it appear that it's fraud proceeds.

10:26:05 14 The government's really main response to
10:26:07 15 that is that it goes to show motive. But the two
10:26:09 16 cases they cite are cases where it says profits from
10:26:12 17 the crime, wire fraud, money laundering, go to motive.
10:26:16 18 Of course they do.

10:26:17 19 But profits from general trading, which
10:26:19 20 are unconnected to fraud, certainly don't go to
10:26:22 21 motive. If anything, the motive is not to commit a
10:26:25 22 crime because you're gaining money legally.

10:26:27 23 So I would have no objection if they
10:26:30 24 narrowed it down to fraud proceeds, but general
10:26:33 25 trading proceeds are irrelevant and it's highly

10:26:36 1 prejudicial.

10:26:39 2 THE COURT: Who wants to respond to that
10:26:41 3 for the government?

10:26:41 4 MR. FORD: Just to be clear, none of my
10:26:43 5 clients' proceeds were fraud proceeds.

10:26:50 6 MR. ARMSTRONG: So, Your Honor, the
10:26:51 7 methodology for these charts is clear. All of these
10:26:54 8 arguments just go to the weight. As we explained to
10:26:57 9 Your Honor yesterday, the way the scheme worked was
10:27:00 10 that they would all coordinate.

10:27:02 11 If you can go to page 2, please, Ms. Kim.

10:27:04 12 THE COURT: What is the relevance of the
10:27:09 13 profit, though, that's not tied to the fraud?

10:27:12 14 MR. ARMSTRONG: Well, Your Honor, our
10:27:12 15 position is that once they established this plan
10:27:16 16 during this window, that the trading profits during
10:27:20 17 this window are part and parcel of the scheme.
10:27:24 18 Because they all start talking about what they're
10:27:26 19 going to do. They all start front loading it, and
10:27:28 20 then they put the plan into action with the false
10:27:31 21 statements.

10:27:31 22 Now, that's just the methodology. They
10:27:34 23 can cross-examine -- they can cross-examine
10:27:37 24 Ms. Garibotti, like, you know, are you alleging fraud
10:27:42 25 as to every single trade in here? And I don't know

10:27:43 1 what her answer would be. That's probably an improper
10:27:48 2 question. It would be improper for us to say -- it
10:27:49 3 would be equally improper for us to say to
10:27:51 4 Ms. Garibotti, like, what are the fraud proceeds here,
10:27:52 5 right?

10:27:53 6 And so the methodology is just the
10:27:54 7 bookends, the windows during the relevant time periods
10:27:56 8 of trading and the relevant time periods of the
10:27:59 9 posting of the messages, and that's it. It's going to
10:28:02 10 be a vanilla presentation.

10:28:07 11 MR. ROSEN: I haven't heard anything about
10:28:08 12 really relevancy into the question of how it proves
10:28:13 13 anything about the actual schemes that are being
10:28:16 14 charged. There's one example we attached to our
10:28:18 15 motion in limine, Your Honor, where my client had
10:28:20 16 bought and effectively sold out almost his entire
10:28:24 17 position before anyone tweeted. Out of \$59,000 in
10:28:30 18 profit, he had gained \$50,000 in profit before any
10:28:32 19 fraud could have possibly taken place. He did sell --
10:28:35 20 he did gain \$9,000 after a tweet, but even the
10:28:38 21 government with their exhibits no -- there was no
10:28:41 22 fraud in that particular tweet.

10:28:44 23 So yet he's tagged in the cover page,
10:28:46 24 which is what the jury is going to focus on, he made
10:28:48 25 \$60,000 trading in one day. How do we un-ring that

10:28:52 1 bell? How do we differentiate? And how do we
10:28:57 2 cross-examine the -- Mrs. Garibotti as to what
10:28:58 3 actually came from fraud, what's proceeds of the
10:29:00 4 scheme or not.

10:29:02 5 They haven't -- the government's set forth
10:29:02 6 no evidence that simply chattering amongst their
10:29:05 7 selves is some type of criminal act or coordinating on
10:29:09 8 what to buy is a criminal act. And that's our
10:29:11 9 problem.

10:29:11 10 It's so prejudicial, these numbers. Some
10:29:13 11 of them are eye-popping numbers. The jury is going to
10:29:16 12 be -- all they're going to do is see that cover page
10:29:19 13 and then, boom. And, you know, it's a 403 objection,
10:29:21 14 a 401 objection, obviously.

10:29:23 15 They can rework these numbers to make
10:29:26 16 them, you know, relevant to the case. We've asked
10:29:28 17 them that for a long time. And here we are. But this
10:29:31 18 is -- I mean, this is really problematic for us.

10:29:34 19 MR. ARMSTRONG: Your Honor, we're going to
10:29:34 20 have testimony from co-conspirators explaining why
10:29:37 21 sales were made before the tweets. This is going to
10:29:41 22 be an issue that is foundational to part of the case
10:29:43 23 and how people got in and out before the tweet was
10:29:47 24 even released. And that was common for them to do
10:29:49 25 that, because they knew that other people just buying

10:29:52 1 the shares themselves was part of it.

10:29:55 2 And you can't, say, excise part of the
10:29:57 3 scheme. You can't just excise part 1 of the fraud
10:30:00 4 scheme, the front load, and then run it from the price
10:30:04 5 before the tweet from the case. That's like excising
10:30:09 6 a relevant period of time and the relevant conduct for
10:30:13 7 that episode in that window.

10:30:19 8 MR. ROSEN: We just had a whole discussion
10:30:20 9 yesterday --

10:30:20 10 THE COURT: That's not what he's
10:30:22 11 complaining about. And I've already said I'm going to
10:30:24 12 let in the charts that, you know, start before and
10:30:28 13 start after. But what he's complaining about is the
10:30:34 14 profit figure. And basically he's making a 403
10:30:37 15 argument that the profit figure is -- one, it's not
10:30:40 16 accurate; but whether it's accurate or not, it's not
10:30:45 17 connected to the fraud.

10:30:47 18 And then -- and that is going to leave the
10:30:55 19 wrong impression with the jury. Its relevance is
10:30:58 20 outweighed by, you know, the danger it has of being
10:31:04 21 traipsed in front of the jury.

10:31:09 22 MR. ROSEN: I mean, we just had a whole
10:31:11 23 conversation yesterday about -- not to beat this to a
10:31:15 24 horse, but a whole conversation yesterday about how if
10:31:15 25 they weren't -- there's no problem with the trading.

10:31:16 1 If they weren't tweeting, we wouldn't be in this
10:31:19 2 predicament here.

10:31:22 3 And so how can we then say, well, the
10:31:23 4 profits from prior to that tweet is fired off are
10:31:26 5 problematic? I mean, there's just nothing wrong with
10:31:29 6 them get -- you know, trading ideas on what to do.
10:31:33 7 The issue is the tweeting, the false statements and
10:31:35 8 misreps. And including a single dollar from before
10:31:40 9 that period, my client's, like, 50,000 out of \$59,000
10:31:45 10 is prior to a single tweet being set off. It's so
10:31:49 11 prejudicial and it's completely irrelevant.

10:31:52 12 MR. ARMSTRONG: Judge, that
10:31:53 13 cross-examination could happen in 30 seconds. They
10:31:56 14 could say, Ms. Garibotti, you see here in this chart
10:31:58 15 that Mr. Rybarczyk bought and sold before the tweet.
10:32:01 16 Right? Right. And he profited \$40,000 from that.
10:32:07 17 Right? Right. So hypothetically that can be carved
10:32:10 18 out of page 1? Right? Right.

10:32:12 19 That goes to the weight. And we're not
10:32:14 20 going to be arguing, like, this extreme prejudice that
10:32:17 21 they're claiming about. We're just putting the
10:32:20 22 methodology in front of the jury saying this is what
10:32:22 23 we did. Here is the work that we did, and we're going
10:32:24 24 to explain why we did it, and both sides can argue it.

10:32:28 25 MR. ROSEN: You still have to satisfy 401

10:32:30 1 and 403. That's not how it works. You don't just get
10:32:33 2 to put in anything you want and then say we get to
10:32:36 3 cross-examine it. If those charts are coming back to
10:32:38 4 the jury under.

10:32:38 5 1006, they have to be accurate and they
10:32:41 6 have to be relevant to the issues at stake in the
10:32:43 7 trial.

10:32:45 8 THE COURT: I'm sustaining the objection
10:32:47 9 to the profit column. The rest of the chart I'm going
10:32:52 10 to admit.

10:32:56 11 MS. CORDOVA: Your Honor, may we be heard
10:33:00 12 on this? And this will relate to all of the Bs.

10:33:02 13 We raised this in our motion for
10:33:07 14 sanctions. And the issue with these charts is that
10:33:09 15 the government is trying to use these charts to
10:33:11 16 preclude the real evidence from the jury and instead
10:33:15 17 put in front of the jury purported tweets of my client
10:33:20 18 that do not contain exculpatory information that was
10:33:24 19 included in the original tweets.

10:33:26 20 So this is --

10:33:28 21 THE COURT: I'm not with you on that.

10:33:30 22 MS. CORDOVA: Okay. So you disagree with
10:33:34 23 me or you --

10:33:35 24 THE COURT: I don't understand you.

10:33:36 25 MS. CORDOVA: Okay. Let me back up, then.

10:33:37 1 So we included on page 8 of our motion for
10:33:42 2 sanctions -- and I can hand this back if it's helpful.
10:33:46 3 This is just an example, and this example relates to
10:33:50 4 Government Exhibit 10B. But it's the same principle
10:33:53 5 that relates to all of the B charts, so it also
10:33:57 6 relates to 2B.

10:33:59 7 And what the government has done is to
10:34:01 8 create these charts. They gave Ms. Garibotti
10:34:04 9 essentially a database. I know it's tiny. Sorry.

10:34:10 10 THE COURT: I hope you have bigger copies
10:34:11 11 for jurors. There's no way they can read any of
10:34:14 12 these.

10:34:16 13 MS. CORDOVA: So what we included there is
10:34:17 14 an example of what the government listed as
10:34:20 15 Mr. Hennessey's tweets in the Excel spreadsheet
10:34:23 16 format. And then we included the actual tweets. And
10:34:25 17 there's two very important parts of the actual tweet
10:34:29 18 that are not included in these summary charts.

10:34:32 19 First is Mr. Hennessey's bio statement.
10:34:37 20 It's him telling everybody who is looking at his
10:34:40 21 tweets who he is and what he's doing. And he says,
10:34:43 22 I'm a trader. I think that one says he's 20-ish, or
10:34:46 23 21 or something. Young kid. He's in college. And I
10:34:49 24 actively trade positions. I could be buying or
10:34:52 25 selling any stock mentioned at any time.

10:34:55 1 That's part of his bio. It's not a
10:34:56 2 disclaimer. It's not some small print. I know it's
10:34:59 3 small print there, but on Twitter, it's part of his
10:35:01 4 bio. It's just a few words. It's who he is. He's
10:35:05 5 telling the world who he is and what he's doing.

10:35:12 6 THE COURT: And he's got that on the top
10:35:13 7 or a part of every tweet he sends out?

10:35:16 8 MS. CORDOVA: It is part of his bio.

10:35:17 9 THE COURT: I didn't ask you that.

10:35:19 10 MS. CORDOVA: So it depends on how you
10:35:20 11 view it. So if you view --

10:35:23 12 THE COURT: Answer my question.

10:35:25 13 MS. CORDOVA: I'm trying to, Your Honor.
10:35:26 14 There are different -- if you view Twitter on a
10:35:29 15 desktop, so on a computer, the bio will show up. Now
10:35:32 16 it shows up on the right-hand side. At this time, it
10:35:35 17 showed up where it shows up there on the left-hand
10:35:37 18 side.

10:35:37 19 But now if you look at it, Twitter has
10:35:39 20 changed their format. The bio will show up every
10:35:42 21 single time right next to the tweet if you're viewing
10:35:44 22 it on the desktop.

10:35:46 23 If you're viewing it on your phone, it
10:35:49 24 will depend on how you have your settings. It also
10:35:52 25 depends on whether you're following the person or

10:35:54 1 you're not following them in terms of what's shown.
10:35:56 2 But it will show -- it's available. Whether it shows
10:35:59 3 up next -- if you're looking at the tweet on your
10:36:02 4 phone, it's not our position that you're going to see
10:36:04 5 his bio every time.

10:36:05 6 You'll see him and you can click on it and
10:36:07 7 see all that language. You'll see his face, but you
10:36:11 8 won't see all of that language because it's condensed
10:36:13 9 for the iPhone, or Android, or whatever, the cellphone
10:36:16 10 viewing.

10:36:16 11 So that's why I say it depends on how
10:36:18 12 you're viewing it. If you're viewing it on your
10:36:21 13 computer, though, which most people who are trading
10:36:23 14 trade on computers, they trade on these big systems
10:36:25 15 and they have, you know, five or six screens going at
10:36:28 16 one time. And so they'll have their desktop up and so
10:36:31 17 they'll see that.

10:36:31 18 So that's information, though, that
10:36:33 19 regardless of whether it's being viewed by the person,
10:36:36 20 is available to the person viewing any of
10:36:40 21 Mr. Hennessey's tweets. So that's number one.

10:36:42 22 But the other part, and this is really
10:36:44 23 important, is Mr. Hennessey was known for doing due
10:36:47 24 diligence. He was this kid in college. He's really
10:36:50 25 into digging into companies. He'd email them. He'd

10:36:54 1 dig into all the SEC filings. He'd dig into the press
10:36:56 2 releases. He'd try to make connections.

10:36:59 3 He was kind of a crowd sourcing person.

10:37:01 4 People would email and text him, you know, due
10:37:05 5 diligence. Hey, I found about this, I found about
10:37:10 6 that. He'd try to put it all together and -- he would
10:37:12 7 try to put it all together, and he'd post about that.
10:37:13 8 So he was known for doing due diligence.

10:37:16 9 And what he would do is he would put the
10:37:18 10 due diligence in his tweets and he would put his
10:37:20 11 sources. And that's really important from a legal
10:37:22 12 perspective. Because to the extent they're saying
10:37:26 13 that his opinions or his statements are false and
10:37:28 14 misleading, the fact that he provided to his followers
10:37:32 15 the basis for his opinion, why he had purchased the
10:37:36 16 stock, he was giving everyone who viewed his post the
10:37:40 17 information to make their own decision. And that, as
10:37:46 18 a legal matter, is legally significant. There are
10:37:47 19 cases that have held --

10:37:47 20 THE COURT: Okay. Let's back up. Are you
10:37:49 21 saying they have misquoted any of the tweets?

10:37:53 22 MS. CORDOVA: No. I am saying --

10:37:55 23 THE COURT: If they've quoted him
10:37:57 24 correctly, I'm going to allow them in.

10:37:57 25 MS. CORDOVA: But he --

10:37:59 1 THE COURT: Now, it could be your job on
10:38:01 2 cross-examination to say, ladies and gentlemen of the
10:38:03 3 jury, the government is not being straight with you.
10:38:05 4 Here's what they left out, and this appears on the
10:38:09 5 left-hand side of every page, you know, these are just
10:38:13 6 my opinions, my ideas. Don't trust them.

10:38:17 7 I mean, but it's not -- you know, they
10:38:20 8 don't have to go back through his whole computer
10:38:24 9 history and put every single word on there.

10:38:26 10 Now, if they -- I'm not going to let them
10:38:28 11 misquote it.

10:38:30 12 MS. CORDOVA: The one exception I'll say
10:38:32 13 to that is that they do not include the actual images.
10:38:36 14 They excised those, and they put in there a link, as
10:38:39 15 opposed to -- so in the Garibotti's reports, in these
10:38:42 16 B exhibits, instead of having the image of the
10:38:44 17 article, like one of them there said -- he's talking
10:38:46 18 about the patent life of one of the drugs at issue
10:38:50 19 that this company owns.

10:38:51 20 And so he includes a clip in the tweet of
10:38:55 21 the article that talks about the patent life. And
10:38:58 22 instead of including that clip, they just put a link.
10:39:00 23 So the jury doesn't see -- and this is -- Your
10:39:05 24 Honor --

10:39:05 25 THE COURT: Show me -- I wish I could read

10:39:05 1 this.

10:39:05 2 MS. CORDOVA: I know. It's tiny.

10:39:09 3 So there's a little link at the end. They
10:39:12 4 quote his language and then there's a little -- it's a
10:39:13 5 URL. So it'll say, like, "http." And that's a link
10:39:17 6 to the article, but they excised that article, and
10:39:19 7 that's legally important.

10:39:21 8 And, Your Honor, the other thing -- it's a
10:39:22 9 Constitutional issue in the sense that they are
10:39:26 10 requiring -- they have not moved to introduce
10:39:28 11 Mr. Hennessey's tweets. They have not introduced
10:39:42 12 Mr. Hennessey's tweets.

10:39:42 13 What they're trying to introduce through a
10:39:47 14 summary chart are database entries from Twitter about
10:39:50 15 Mr. Hennessey's tweets. And what they're doing is
10:39:54 16 they're forcing Mr. Hennessey to himself introduce the
10:39:56 17 evidence that they will be using to actually seek to
10:40:00 18 convict him, and that should not be his burden. They
10:40:02 19 should have to put in the actual evidence, what
10:40:05 20 actually appeared to followers. It should not be
10:40:08 21 Mr. Hennessey's duty to do that.

10:40:09 22 So I understand the point about
10:40:11 23 cross-examination and we're prepared to do that. But
10:40:12 24 my bigger concern here is that, as his defense
10:40:15 25 attorney, I'm putting into evidence the actual

10:40:18 1 evidence that they should be putting in to try to get
10:40:21 2 a conviction.

10:40:22 3 THE COURT: Well, hold on. Then why isn't
10:40:22 4 your objection to this it's hearsay?

10:40:32 5 MS. EPLEY: We object to hearsay.

10:40:34 6 MS. CORDOVA: It is.

10:40:34 7 THE COURT: Well, it ought to be.

10:40:35 8 MS. CORDOVA: I think that is the
10:40:37 9 objection, Your Honor.

10:40:40 10 MR. DAVIS: Objection too.

10:40:43 11 MS. CORDOVA: I think, Your Honor, that is
10:40:43 12 the objection. And I've spent a lot of time trying to
10:40:46 13 explain it, but that is essentially the objection.

10:40:49 14 THE COURT: I mean, how are you going to
10:40:50 15 prove this up?

10:40:53 16 MR. ARMSTRONG: Judge, with respect to --
10:40:54 17 the hearsay point is the easiest one. It's the
10:40:58 18 party's own statements under 801(d)(2)(a).

10:41:01 19 THE COURT: It's what?

10:41:05 20 MR. ARMSTRONG: It's an opposing party's
10:41:10 21 own statement under 801(d)(2)(a).

10:41:13 22 Ms. Cordova just said that the content is
10:41:15 23 accurate. And so to some extent, like, what are we
10:41:18 24 really doing here?

10:41:19 25 So on the URL point, the reason why we did

10:41:23 1 not capture the link that's being cited to in the
10:41:27 2 tweet is because we don't know, sitting here today,
10:41:31 3 whether that link shows the same content that was
10:41:36 4 available at that time.

10:41:37 5 As Your Honor knows, articles change, the
10:41:39 6 format changes. And so we don't know, sitting here in
10:41:42 7 2024, whether that link is the same link that was
10:41:47 8 linked to, you know, at the time back in 2020 or 2021.

10:41:51 9 And so what we did as part of the
10:41:53 10 methodology is we just showed that there is a link.
10:41:55 11 And if they want to go and introduce this link, that's
10:41:58 12 fine. They can do that. But we have very clear
10:42:03 13 methodology. We have a very clear explanation for why
10:42:06 14 we did it, and that's that why we did it.

10:42:09 15 And all of these underlying materials come
10:42:11 16 from the Twitter search warrant return. And so they
10:42:17 17 are business records under 801, 803(6). And the
10:42:24 18 statements of Mr. Hennessey come in under 801(d)(2)(A)
10:42:27 19 as statements of a party opponent.

10:42:29 20 And so every layer of the hearsay tree is
10:42:34 21 followed through, and there is no question about that.
10:42:36 22 And that is the least meritorious of any of the
10:42:39 23 arguments.

10:42:40 24 MS. CORDOVA: Your Honor, it's also an
10:42:42 25 objection under 1002, which is the original. And what

10:42:46 1 the government is trying to do -- I think of it as
10:42:48 2 like if the government were trying to prove contents
10:42:52 3 of an invoice and say, okay, the invoice says -- if
10:42:56 4 our position was the invoice had on there the terms of
10:42:59 5 payment and then that invoice got entered into
10:43:02 6 QuickBooks and then they got the download from
10:43:05 7 QuickBooks and the QuickBooks didn't have the terms,
10:43:07 8 they would say, look, there were no terms. Look, this
10:43:09 9 is what the invoice -- the information from the
10:43:11 10 invoice.

10:43:11 11 That's the way Twitter works. They
10:43:14 12 created a database of specific information, not all of
10:43:17 13 the information, specific information from these
10:43:20 14 tweets and the government collected that database.
10:43:22 15 They did not in their investigation go out and collect
10:43:25 16 the original documents.

10:43:26 17 So our objection is also under 1502.

10:43:29 18 THE COURT: Wait a minute. What would be
10:43:30 19 the original documents?

10:43:30 20 MS. CORDOVA: The tweets themselves.

10:43:32 21 THE COURT: A computer hard drive?

10:43:35 22 MS. CORDOVA: The tweets themselves, Your
10:43:35 23 Honor. And they're available on the Wayback Machine.
10:43:36 24 And we've collected them and we've produced them to
10:43:38 25 the government.

10:43:38 1 MR. ARMSTRONG: So, Your Honor, this is an
10:43:39 2 important point that is being glossed over. Your
10:43:42 3 Honor is looking at a book. Do you want me to give
10:43:45 4 Your Honor some time to look at something?

10:43:45 5 THE COURT: Pardon me?

10:43:45 6 MR. ARMSTRONG: I see you're looking at
10:43:45 7 the rule book. Do you want some time to look at that?

10:43:45 8 THE COURT: No. Go ahead.

10:43:52 9 MR. ARMSTRONG: Thank you.

10:43:52 10 MR. FORD: Your Honor, we're talking sort
10:43:58 11 of abstract and theoretically. Can we pull up an
10:44:01 12 example on the computer?

10:44:03 13 THE COURT: I don't know. I wish you
10:44:04 14 would. I can't read any of the other ones.

10:44:06 15 MR. FORD: We'll show you what's happening
10:44:08 16 here and how they modified these through the Garibotti
10:44:12 17 chart. So this was -- this is one of the tweets at
10:44:16 18 issue, according to the government, and this was what
10:44:20 19 my client put on Twitter. Clearly meant to be humor.

10:44:27 20 When you see this sort of tweet in the
10:44:30 21 Garibotti chart, they have removed the video or the
10:44:33 22 image, the meme. And they have replaced it at times
10:44:41 23 and then, of course, as we discussed, highlighted
10:44:42 24 yellow and suggested that it was some sort of false
10:44:44 25 statement.

10:44:46 1 THE COURT: Okay. But I'm missing what
10:44:47 2 goes with this.

10:44:49 3 MR. FORD: It would be Exhibit --

10:44:50 4 THE COURT: I mean, I wouldn't admit this
10:44:51 5 by itself. It's irrelevant.

10:44:54 6 MR. FORD: No. It's relevant because it's
10:44:56 7 listed on Exhibit 14B of the government's exhibit.

10:44:59 8 THE COURT: Okay. Well, that's why I'm
10:45:00 9 asking you, what goes with it?

10:45:03 10 MR. FORD: Exhibit 14B, which is -- again,
10:45:07 11 we can pull one up from Exhibit 2B, which is what
10:45:10 12 we're talking about. And we can pull an example of
10:45:16 13 one of the tweets that they've modified from Exhibit
10:45:19 14 2B.

10:45:23 15 THE COURT: Hold on. I'm looking for 14.

10:45:29 16 Rhonda, it's in the next notebook.

10:45:31 17 MR. ARMSTRONG: Judge, we're not even
10:45:33 18 contending that that's false. So, like, what are we
10:45:35 19 even arguing about here?

10:45:42 20 MR. FORD: We're going to pull up an
10:45:44 21 example from 20B, which the government is arguing is
10:45:47 22 false. We'll show you first the way it's --

10:45:51 23 THE COURT: Okay. I've got 14B in front
10:45:53 24 of me.

10:45:54 25 MR. FORD: I apologize. Can --

10:45:56 1 THE COURT: There's not an obvious place
10:45:58 2 where a picture, like the one you just showed me,
10:46:00 3 would fit in.

10:46:01 4 MR. FORD: We're going to pull up an
10:46:03 5 example from 20B, which the government is alleging was
10:46:07 6 a false statement. 20B.

10:46:15 7 THE COURT: Rhonda, that would be the next
10:46:16 8 notebook.

10:46:17 9 MR. FORD: Your Honor, we're going to pull
10:46:19 10 it up right here to make it easier.

10:46:24 11 So can you pause that, Emily? Before
10:46:27 12 doing that, can you go back to the Garibotti chart?

10:46:29 13 So if you look at the absolute bottom
10:46:34 14 line, they have, again, highlighted in yellow that the
10:46:36 15 statement was false. It says: BBI to a dollar,
10:46:49 16 <https://t.co/3koe4imsw>, and that was a -- they claim
10:46:51 17 was a false statement in support of securities fraud.

10:46:57 18 What we are objecting to is this is what
10:46:59 19 my client actually posted on the internet at that
10:47:04 20 time.

10:47:04 21 Can we start from the beginning and put
10:47:06 22 the volume up?

10:47:07 23 MR. ARMSTRONG: Which line are we talking
10:47:09 24 about?

10:47:10 25 MR. FORD: Line 64.

10:47:15 1 (The video played.)

10:47:27 2 MR. FORD: The intent of the post was
10:47:31 3 satirical. It was meant to be funny. It was meant to
10:47:34 4 be entertaining. And all of that is removed from the
10:47:38 5 context when they place it into the chart without the
10:47:44 6 actual video or photograph.

10:47:48 7 Obviously, my client is slightly
10:47:50 8 differently situated in that he was a satirical
10:47:54 9 personality on the internet, and that's how he
10:47:56 10 entertained his Twitter followers.

10:47:59 11 For other individuals, you'll see that the
10:48:01 12 images that were removed were quotations to due
10:48:06 13 diligence that they did through SEC filings, newspaper
10:48:11 14 articles and so forth. And nearly all of that has
10:48:16 15 been removed from these charts.

10:48:20 16 MR. ARMSTRONG: Your Honor, they're asking
10:48:21 17 you to exclude evidence and they're not even
10:48:24 18 accurately capturing what our evidence shows.

10:48:28 19 Mr. Ford just says that that video is not in the
10:48:31 20 chart. It's in the chart.

10:48:33 21 And so there are just extreme liberties
10:48:35 22 being taken here to ask you to exclude stuff. And
10:48:38 23 they're trying to pull the wool over your eyes and not
10:48:41 24 even trying to accurately cite what's actually going
10:48:43 25 on.

10:48:43 1 That video is right here on line 514 of
10:48:47 2 the chart. This is ridiculous.

10:48:50 3 MS. EPLEY: Your Honor, that makes a
10:48:51 4 perfect example of how the government uses the exact
10:48:54 5 same information when it suits their needs and their
10:48:56 6 narrative. They are the ones who are misleading the
10:48:59 7 Court and leaving things out of the record.

10:49:01 8 So to be clear, when the defendants'
10:49:04 9 statements are in the Twitter records, that is hearsay
10:49:07 10 within hearsay. They need to first get around the
10:49:09 11 fact that Twitter recorded the records, and their
10:49:11 12 retention and production are as important as whether
10:49:14 13 or not it was kept in the regular course or routine to
10:49:17 14 create at or near. The production and retention --

10:49:17 15 THE COURT: Okay. Let's assume that I
10:49:21 16 think they're statements of a party opponent.

10:49:23 17 MS. EPLEY: Yes. Then the next piece is,
10:49:24 18 if I post on Twitter, gosh, it's really cold outside
10:49:28 19 and I post a picture that shows my dashboard is 110,
10:49:30 20 degrees, those two things cannot be viewed without
10:49:32 21 unison.

10:49:34 22 They, by definition, as required, 100
10:49:38 23 percent of the time are viewed together. You can't
10:49:39 24 see one without the other, except for in the
10:49:41 25 government's productions. They split those two items

10:49:44 1 in most cases, but join them --

10:49:46 2 THE COURT: Give me your example again
10:49:48 3 since I can't see it.

10:49:49 4 MS. EPLEY: Yes. If I, Erin Epley, put on
10:49:51 5 Twitter, gosh, it's really cold outside. And the
10:49:53 6 government wants to prosecute me for lying about the
10:49:56 7 weather, but the picture shows my dashboard as 110
10:49:59 8 degrees, you have to view those two things together.

10:50:02 9 And when it suits them, they have
10:50:04 10 precluded it, which brings us back to Ms. Cordova's
10:50:07 11 point. Then the defense is obligated, in order to
10:50:10 12 give a clear picture, to produce the government's
10:50:12 13 evidence. The burden is on them.

10:50:16 14 And instead they want to use narrative in
10:50:18 15 the equivalent of an Excel spreadsheet. They don't
10:50:20 16 want us to show the disclaimers. They don't want to
10:50:23 17 show the context. They don't want to show the icon.

10:50:25 18 And we're asking this Court not to allow
10:50:27 19 them to keep doing that. To make them put forth the
10:50:30 20 evidence they want to use and not force us to do it
10:50:32 21 for them.

10:50:33 22 MR. ARMSTRONG: So, Your Honor, this -- I
10:50:38 23 guess, Your Honor, what questions do you have?
10:50:41 24 Because this is kind of like Whac-A-Mole. And so
10:50:44 25 we're happy to resolve Your Honor's concerns on, like,

10:50:47 1 the multimedia point. When there was a post that
10:50:55 2 Mr. Ford alleged a second ago that we're not claiming
10:50:59 3 to be false, yeah, we didn't include it in here
10:51:02 4 because that would be just reams and reams and reams
10:51:05 5 and reams of additional pages. And so we tried to
10:51:09 6 focus, where it was relevant, the multimedia that
10:51:12 7 attaches to what we allege to be the false statements.

10:51:15 8 So, again, all this stuff is very clear.
10:51:19 9 And there are reasons why we did it. And a lot of
10:51:22 10 these objections are just completely spurious and
10:51:26 11 don't have a basis.

10:51:26 12 And just one last point about
10:51:28 13 Mr. Hennessey's tweet that I think is important.
10:51:29 14 There is all this talk about, oh, we need the best
10:51:32 15 evidence, you know, we need the best evidence. But a
10:51:34 16 lot of these tweets have been deleted since the
10:51:37 17 indictment. And so they're saying, oh, my gosh, like
10:51:40 18 we need the best evidence. Well, sure, where is it?
10:51:43 19 It's been deleted. So it's no longer on Twitter. So
10:51:46 20 we can't really see how it looked at the time. We
10:51:49 21 have some scrapes of it that we took with a paralegal
10:51:51 22 from before indictment. They were there then. But
10:51:53 23 now, miraculously, they're not there now. And so
10:51:56 24 there is some unclean hand arguments going on here as
10:52:00 25 well.

10:52:00 1 MS. EPLEY: I know many people want to
10:52:01 2 speak, but just for clarity, so I can sit down.

10:52:04 3 The first, in terms of best evidence, it
10:52:06 4 is a basic foundation of what every lawyer in this
10:52:09 5 room does, and so him mocking it doesn't make sense to
10:52:13 6 me. The best evidence is available for the vast
10:52:16 7 majority of the defendants, and the obligation is on
10:52:18 8 him to provide it.

10:52:18 9 But more than that, and for the record, he
10:52:19 10 can either do it now or at trial we can use Rule 106
10:52:24 11 under optional completeness and force him to do it
10:52:26 12 then.

10:52:27 13 MR. ARMSTRONG: Judge, the best evidence
10:52:28 14 is the search warrant return from Twitter that has a
10:52:32 15 902(11) certification that we used to build these
10:52:35 16 records. The best evidence is the Discord return that
10:52:39 17 we used to build these records. All of these records
10:52:42 18 have 902(11) certifications saying that they are
10:52:46 19 business records, and all these records are the
10:52:48 20 statements -- are the parties' own statements under
10:52:50 21 801(d)(2)(A).

10:53:00 22 THE COURT: Here's the basic problem.
10:53:01 23 Let's say hypothetically, and I'm going to use the
10:53:04 24 buxom young lady that was drinking the drink that was
10:53:07 25 attached to the video we just watched.

10:53:09 1 MR. FORD: They included that one, but not
10:53:11 2 the ones where my client is actually presenting why he
10:53:14 3 thinks it's a good stock, but --

10:53:16 4 THE COURT: Okay. But, I mean, you don't
10:53:21 5 want the tweets where the Lamborghinis are in it, and
10:53:26 6 you objected to all this other stuff. Now, you can't
10:53:29 7 pick and choose. And I'm willing to listen to say,
10:53:34 8 okay, we're going to put everything in. But you can't
10:53:40 9 say, well, Judge, I want everything but this.

10:53:45 10 Now, it's, I think, totally unreasonable
10:53:57 11 to expect the government, even though I know the
10:53:58 12 burden of proof is on them, to have to go through and
10:54:00 13 put in every tweet. I mean, these guys are tweeting
10:54:04 14 24/7, and they did it for years. I mean, you know, we
10:54:08 15 couldn't get that much paper into this courtroom.

10:54:13 16 And I think it's -- they have the right to
10:54:21 17 pick and choose what evidence they want to put in
10:54:23 18 front of the jury as long it's not deceptive. And
10:54:27 19 I've said this before.

10:54:31 20 Now, having said that, I don't know why,
10:54:38 21 with regard to these tweets -- and how many are we
10:54:41 22 looking at? Hundreds?

10:54:42 23 MR. FORD: Yeah, Your Honor, we're in the
10:54:44 24 hundreds. I will say this was -- this is giving rise
10:54:48 25 to an apparent Sixth Amendment violation. In

10:54:51 1 Ms. Garibotti's expert report, she did not make the
10:54:54 2 determination that you're describing. She didn't
10:54:57 3 decide when to include or not include a tweet. When
10:55:00 4 to include a video that they think is going to be
10:55:02 5 prejudicial to the jury, but when to exclude an image
10:55:06 6 where it's not -- where it would be beneficial to the
10:55:09 7 defense. Somebody else made that decision.

10:55:10 8 And so when I attempt to cross-examine
10:55:14 9 her, I will say, well, how -- why did you choose to
10:55:15 10 put this video in, but not this other video. She's
10:55:18 11 not going to have an answer, because she says in her
10:55:21 12 report she didn't do it, it was fed to her by the DOJ.
10:55:24 13 That would require me to call Mr. Armstrong, or
10:55:27 14 whoever made this determination --

10:55:29 15 THE COURT: And your next question is not
10:55:30 16 going to be, so you didn't look at this and you didn't
10:55:33 17 look at this and you didn't look at this and you
10:55:35 18 didn't look at this, all the way down?

10:55:37 19 MR. FORD: It will be, but I'll never have
10:55:38 20 an opportunity to confront the individual who made the
10:55:42 21 testimonial determination to include or not include.
10:55:44 22 And so I can't present an argument to the jury without
10:55:47 23 confronting them, and I don't know who it is. It
10:55:50 24 could have -- you know, but she did not make these
10:55:53 25 determinations. This is an inherently testimonial

10:55:57 1 document by virtue of determining to include, but not
10:56:00 2 include other information. It's right there in the
10:56:03 3 first two pages of her report that she didn't make
10:56:05 4 that decision.

10:56:07 5 MR. ARMSTRONG: Judge, every single
10:56:08 6 summary chart since the beginning of time involves
10:56:12 7 information that one lawyer thinks is important or
10:56:14 8 not. This is not a Constitutional issue. This is
10:56:18 9 everything that happens in trial and has been
10:56:21 10 happening in trial since probably well before Your
10:56:24 11 Honor's time.

10:56:25 12 So to argue that, like, a selection of
10:56:27 13 information to put before the jury is a Constitutional
10:56:30 14 violation is just far out of bounds.

10:56:33 15 MR. FORD: Normally the expert in these
10:56:35 16 situations, especially when they're paid \$750,000, the
10:56:38 17 expert makes the decision and that's very easy because
10:56:41 18 you ask the expert, why did you make this decision and
10:56:44 19 they explain it, right?

10:56:46 20 In this situation, we are cut off at the
10:56:48 21 knees. We'll never be able to assert our Sixth
10:56:52 22 Amendment right and ask the summary witness why it was
10:56:57 23 that she selected some statements and not other
10:57:01 24 statements.

10:57:09 25 THE COURT: You want to weigh in?

10:57:11 1 MR. REYES: Yes, Your Honor, just briefly.
10:57:12 2 Just something that you haven't heard yet, which is --

3 THE COURT REPORTER: Can you move that mic
4 down?

5 MR. REYES: Yes, ma'am.

6 THE COURT: She's never happy. She either
7 wants the mic up or down.

10:57:22 8 MR. REYES: I could step on his phonebook.
10:57:22 9 No, just kidding.

10:57:25 10 Your Honor, I have here -- we actually
10:57:27 11 created some demonstrative counter exhibits to
10:57:29 12 illustrate these points. I can hand these to the
10:57:32 13 Court, but --

10:57:35 14 THE COURT: Give them to Rhonda.

10:57:38 15 MR. REYES: In terms of what's going on
10:57:40 16 here, in terms of the idea of deception or misleading,
10:57:44 17 which would be enough, they have part -- they have the
10:57:48 18 quote, but they don't have the whole proper
10:57:52 19 representation of what is actually being said by the
10:57:55 20 defendant.

10:57:56 21 So, first of all, Your Honor, we went back
10:58:00 22 and found the things that were from the URL, which
10:58:05 23 Mr. Armstrong said they may have been deleted. We
10:58:09 24 found it all in their production. It's there. They
10:58:11 25 have it. We sourced it.

10:58:13 1 If you look under our images, it gives you
10:58:15 2 the DOJ stamp. That's where we got it. It took a lot
10:58:20 3 of work, but the -- all the reports are replete with
10:58:24 4 those types. So you'll see an image there where
10:58:26 5 Mr. Matlock says something about a stock, but the link
10:58:28 6 actually shows you objective publicly available data
10:58:32 7 that he's quoting or from someone else who is posting
10:58:35 8 it, right?

10:58:36 9 So to the extent that these things are
10:58:38 10 about attribution to our defendant, our defendants are
10:58:41 11 saying where they got this information. In that first
10:58:46 12 quote, he's quoting another person in the market. In
10:58:48 13 the next few pages, he's quoting all kinds of data,
10:58:51 14 things that are -- again, are actually available,
10:58:54 15 which were the full picture of what he was saying at
10:58:57 16 the time.

10:58:57 17 Now, yes, we can cross-examine about these
10:59:00 18 things, but it is misleading. And six weeks later
10:59:03 19 what the jury -- or ten weeks, God bless, 14
10:59:07 20 weeks later -- not 14, but when the jury finally gets
10:59:10 21 this case, and these things go back to the jury, are
10:59:14 22 they going to remember the cross-examination and all
10:59:16 23 the things that are missing and the other pages have
10:59:22 24 a --

10:59:22 25 THE COURT: You mean a week later?

10:59:24 1 MR. REYES: From your mouth to God's ears.

10:59:27 2 MR. ARMSTRONG: So, Your Honor, that issue

10:59:29 3 that Mr. Reyes is raising is extremely relevant,

10:59:31 4 because Mr. Matlock is one of the individuals who

10:59:33 5 deleted a lot of his tweets. And so we're going to

10:59:36 6 have a witness testify from the SEC that explains that

10:59:39 7 a lot of the tweets that are cited in these charts

10:59:43 8 were scraped from open source data. And they're not

10:59:45 9 actually available in the Twitter return because they

10:59:49 10 were deleted by Mr. Matlock.

10:59:50 11 So, again, all of these arguments about,

10:59:52 12 oh, the best evidence ring really hollow when a lot of

10:59:55 13 these messages were deleted by the defendants

10:59:57 14 themselves.

10:59:58 15 THE COURT: Okay. Why isn't this all

11:00:00 16 cured by admitting all the tweets?

11:00:10 17 MR. ARMSTRONG: I'm sorry, I'm not sure I

11:00:11 18 follow you.

11:00:12 19 THE COURT: Well, let's say we don't like

11:00:16 20 this tweet because it's just the summary, or it's just

11:00:20 21 a part. It's actually the top portion of this. And

11:00:28 22 we have notebooks, because it's not like we have a

11:00:31 23 shortage of notebooks or documents, that contain all

11:00:34 24 the tweets.

11:00:35 25 So the entire tweet is in evidence.

11:00:39 1 MR. REYES: Your Honor --
11:00:40 2 MS. CORDOVA: Go ahead.
11:00:41 3 MR. REYES: I was just going to quote you.
11:00:44 4 I was going to quote Ms. Cordova, which is it's not
11:00:45 5 our case, it's not our burden to admit evidence that
11:00:48 6 they would then use against us.

11:00:49 7 Now, like I said earlier --

11:00:51 8 THE COURT: Well, I know. You're
11:00:53 9 objecting to the government's saying it's not
11:00:57 10 complete. We'll put it in there. It'll be in
11:01:02 11 evidence. And then the government will have their
11:01:04 12 summary and they can say, yeah, this came from
11:01:09 13 page 152 of notebook number 8. And you see the entire
11:01:13 14 tweet. And you guys can get up on cross-examination
11:01:16 15 and pick up notebook number 8 at page 152 and question
11:01:21 16 the witness from it.

11:01:22 17 Why doesn't that solve it?

11:01:25 18 MS. CORDOVA: Your Honor, they never
11:01:26 19 collected the actual tweets in this case.

11:01:29 20 THE COURT: Well, they had to collect
11:01:31 21 something or they wouldn't have this information.

11:01:33 22 MS. CORDOVA: Well, what they did -- and
11:01:34 23 it's a fine investigative technique, but what they did
11:01:37 24 is they served a search warrant to Twitter. Twitter
11:01:39 25 has a database, like I said, it's just like a

11:01:42 1 QuickBooks or anything else. It collects specific
11:01:44 2 data points. They save it in this big database, and
11:01:48 3 then they spit that database out to the government.

11:01:50 4 They didn't provide the tweets to the
11:01:52 5 government. They provided data in a database.

11:01:55 6 Now what the government could have done
11:01:57 7 with that is then go to the Wayback Machine and
11:02:00 8 collect the tweets, because they're all there, and so,
11:02:03 9 okay, here's the tweet, here's the tweet, here's, the
11:02:06 10 tweet, and then they would --

11:02:06 11 THE COURT: Well, I'm hearing they're not
11:02:07 12 all there, but go ahead.

11:02:09 13 MS. CORDOVA: No, they are on the Wayback
11:02:12 14 Machine. And that's what we have.

11:02:12 15 Your Honor, I also want to address that
11:02:13 16 comment about Mr. Hennessey's tweets. Mr. Hennessey
11:02:15 17 did delete tweets prior to ever learning of an
11:02:19 18 investigation or this indictment, which he learned
11:02:21 19 about the investigation when the FBI knocked on his
11:02:23 20 door at 6:00 a.m. the day he was arrested. So he --
11:02:27 21 there is absolutely no unclean hands here. And they
11:02:30 22 should be precluded, absolutely precluded from
11:02:33 23 mentioning anything like that to the jury.

11:02:35 24 Every single one of his tweets -- and some
11:02:36 25 of the ones that the government has marked as false

11:02:39 1 are actually still on Twitter, which is a little bit
11:02:41 2 ironic, given that they're saying that this was
11:02:44 3 somehow nefarious. But every single one of his tweets
11:02:48 4 is available on the Wayback Machine. And they haven't
11:02:51 5 gone to look for it, but it's there. They didn't
11:02:53 6 collect it. They didn't produce it. They didn't mark
11:02:55 7 it as exhibits.

11:02:56 8 So we should not be in a position where
11:02:57 9 we're presenting the true evidence in the case against
11:02:59 10 our own clients.

11:03:03 11 MR. ARMSTRONG: Judge, just to put a bow
11:03:04 12 on this. We used search warrant materials. Search
11:03:09 13 warrant materials, from the beginning of time, have
11:03:10 14 been the best evidence and they have been unassailable
11:03:14 15 because they are directly from the party that hosts
11:03:18 16 and keeps the data as their own business records.

11:03:21 17 And we're summarizing that material in
11:03:24 18 these records. So all these arguments go to the
11:03:28 19 weight, not to the admissibility, because every single
11:03:31 20 tweet in here, we source and explain why it's not
11:03:34 21 hearsay, why it's authentic and why it is admissible.

11:03:38 22 They can argue all day that our summary
11:03:41 23 charts, our evidence should have included X, Y, and Z.
11:03:45 24 That's all we're talking about. We're just talking
11:03:46 25 about arguments about weight. We have a very clear

11:03:50 1 methodology as to how these were done, how they were
11:03:53 2 created, and why every single piece in here is
11:03:56 3 otherwise admissible.

11:03:57 4 MR. FORD: Your Honor, if I may quickly.
11:03:59 5 We were just going to pull something up for you to see
11:04:02 6 on a point I made earlier. With regards to the last
11:04:07 7 comment, you know, whatever Twitter data they
11:04:11 8 received, nobody ever saw, right? And the argument
11:04:15 9 being presented by the government --

11:04:17 10 THE COURT: Wait, wait, wait. Somebody
11:04:18 11 had to see it.

11:04:19 12 MR. FORD: No, no. Because what they
11:04:21 13 saw -- what they would have seen was tweets. They
11:04:23 14 wouldn't have seen what we received from Twitter,
11:04:25 15 which is HTML we're about to show you in one second.
11:04:31 16 So let me go to this first point, which is, this is
11:04:33 17 the scope of what Ms. Garibotti said she was going to
11:04:36 18 do at trial. She was going to calculate the profits.
11:04:44 19 And then summarize at-issue activity and public
11:04:48 20 communications that reference the applicable security
11:04:50 21 and then was asked to flag statements that the DOJ
11:04:57 22 alleges to be false.

11:04:58 23 In other words, she was never hired to
11:05:01 24 make a determination about what tweets to include or
11:05:04 25 whether those tweets were false. Again, this raises

11:05:07 1 the significant Sixth Amendment issue, because we
11:05:10 2 won't be able to effectively cross-examine her or
11:05:13 3 anybody because we don't know who made that
11:05:15 4 determination.

11:05:17 5 To go back to the first point, Emily, if
11:05:23 6 we can pull the BBI example of the video we showed so
11:05:26 7 you can -- you can see, Your Honor, what they saw --
11:05:31 8 not the actual -- the Twitter return data. Not the
11:05:35 9 video.

11:05:41 10 THE COURT: All I can say is this person
11:05:43 11 looks like she's having more fun.

11:05:54 12 MR. FORD: Well, yeah. So this is what
11:05:55 13 the government received from Twitter. It's an
11:05:59 14 excerpt. And this shows, if you look, it says, BBI to
11:06:04 15 a dollar with the link and then, you know, we scroll
11:06:09 16 down. It's gibberish. It's HTML code. That's the
11:06:14 17 coding for the video.

11:06:16 18 That's what the government received from
11:06:18 19 Twitter. So that's the only evidence they have. It
11:06:22 20 is bad evidence for a bad case, but this is their
11:06:25 21 evidence.

11:06:26 22 THE COURT: Well, wait. This may be a bad
11:06:27 23 example, but, I mean, that is the only text on this
11:06:31 24 that you've showed me is what the government quoted.

11:06:35 25 MR. ARMSTRONG: Exactly. What are we

11:06:36 1 talking about?

11:06:37 2 MR. FORD: We're talking about the fact
11:06:38 3 that nobody on the planet saw this, because it was
11:06:43 4 obtained by search warrant for this case and is now
11:06:46 5 being introduced as evidence that individuals who were
11:06:52 6 Twitter followers saw this. They never saw this HTML
11:06:57 7 data. All this does is reflect the fact that these
11:06:58 8 actions occurred on the internet.

11:06:58 9 THE COURT: This, I'm not following you
11:06:59 10 on. I'm not following your argument here.

11:07:02 11 MR. ARMSTRONG: We're not offering this
11:07:04 12 data -- this data was pulled together and it was
11:07:09 13 depicted in the same way that --

11:07:11 14 THE COURT: I mean, go back to your video.
11:07:13 15 The only thing they're saying is that --

11:07:19 16 MR. FORD: Right. But nobody saw --

11:07:21 17 THE COURT: -- we've got the spring
11:07:22 18 breaker.

11:07:23 19 MR. FORD: Nobody saw just that, right?
11:07:26 20 The issue is they're making the argument that people
11:07:28 21 saw this and acted on it. But the evidence they're
11:07:30 22 seeking to introduce from the Twitter return does not
11:07:33 23 reflect data that anybody saw or acted on. Nobody on
11:07:37 24 the witness stand can say, I saw this tweet and acted
11:07:40 25 on it, because they would not have seen this HTML

11:07:44 1 data.

11:07:44 2 What they would have seen, if they saw it,
11:07:46 3 was the video that we're showing to you.

11:07:49 4 THE COURT: It's the same thing.

11:07:50 5 MR. FORD: No -- well, no. Because what
11:07:52 6 my client posted is a video of a girl chugging a beer
11:07:55 7 on spring break as a joke. That's what they would
11:07:58 8 have seen.

11:07:58 9 And, remember, we're --

11:08:00 10 THE COURT: Well, the caption is, dollar
11:08:05 11 sign BBI to \$1.

11:08:09 12 MR. ARMSTRONG: That's why we're offering
11:08:10 13 it, Your Honor, for that statement.

11:08:11 14 MR. FORD: That's exactly correct.

11:08:12 15 THE COURT: So I'm missing your point,
11:08:14 16 Mr. Ford. I mean, the government has accurately
11:08:16 17 quoted that.

11:08:18 18 MR. ARMSTRONG: 100 percent.

11:08:20 19 MR. FORD: They have not accurately quoted
11:08:21 20 that. The materiality standard, as well as even
11:08:25 21 Federal Rule 106 of the Rules of Evidence, requires
11:08:28 22 that the entire communication be put into evidence.
11:08:33 23 They failed to obtain this prior to filing this
11:08:37 24 indictment and purporting to litigate this case. It
11:08:40 25 was a flaw by the government to not obtain the actual

11:08:43 1 evidence that could be used at trial.

11:08:45 2 MR. ARMSTRONG: Your Honor, this is just
11:08:46 3 gobbledegook at this point. Our line in our
11:08:49 4 exhibit -- can I hand it up to Your Honor?

11:08:53 5 -- line 514 it shows exactly what Mr. Ford
11:08:56 6 is talking about. This is just nonsense.

11:08:58 7 MR. FORD: Your Honor, the point -- look,
11:09:04 8 we are showing you two separate sets of examples where
11:09:06 9 the government includes the video where it's
11:09:08 10 prejudicial to the client, and they think it will make
11:09:11 11 him look bad, and then they remove the image when it
11:09:15 12 would be beneficial to the defense.

11:09:18 13 That decision was outside of the scope of
11:09:20 14 Ms. Garibotti's work. She is not -- she cannot
11:09:24 15 testify about it because she didn't do it. So who did
11:09:27 16 it? Who provided the data? According to her report,
11:09:29 17 it was not by the FBI. So there will not be an agent
11:09:34 18 testifying. It was provided by the DOJ.

11:09:37 19 We have a right to examine the individual
11:09:40 20 from the DOJ who was providing this information and
11:09:42 21 they do not appear anywhere on their witness list.

11:09:46 22 MR. ARMSTRONG: Judge, they've made this
11:09:48 23 whole fuss about how Ms. Garibotti cannot talk about
11:09:50 24 the falsity of the statements. And that's fine. Your
11:09:54 25 Honor made your ruling on that.

11:09:55 1 But that's why we chose to put certain
11:10:00 2 ones in because they related to the false statements.
11:10:02 3 And Your Honor hit the nail on the head. If we
11:10:05 4 included every multimedia from every single post about
11:10:08 5 this, random things about a stock, these summary
11:10:11 6 charts which are accurate and are admissible, would be
11:10:15 7 five times in length. And that's just totally
11:10:17 8 unwieldy.

11:10:19 9 MS. EPLEY: The burden is on the
11:10:20 10 government, unwieldy or not. The Rules of Evidence
11:10:23 11 allows for a business record to be used in regards to
11:10:26 12 hearsay because it meets particular norms. Part of
11:10:30 13 that is the production and the retention, which the
11:10:34 14 government does not have.

11:10:35 15 They want to offer the Garibotti charts
11:10:37 16 with the equivalent of Excel lines to establish a
11:10:40 17 timeline and to create gravitas in regards to what
11:10:43 18 they think is relevant to their case, as they're
11:10:47 19 entitled to do.

11:10:47 20 And they want to do it without putting in
11:10:49 21 the underlying records, without allowing the defense
11:10:51 22 the ability to have admissible evidence to move
11:10:53 23 forward in regards to put forth that evidence. As you
11:10:58 24 will find soon, they're going to object to each and
11:11:00 25 every one of our tweets.

11:11:01 1 They do that despite the fact that this
11:11:03 2 isn't being presented the way it would have been
11:11:05 3 originally perceived, which is their onus. They act
11:11:07 4 like it's ridiculous for us to object to that, which
11:11:10 5 is on the face false, and then they offer partial
11:11:14 6 evidence.

11:11:15 7 It was not viewed as an HTTPS link. It
11:11:19 8 was viewed as a website source. And whether that is
11:11:22 9 damning to the defendants or useful to them is not
11:11:25 10 something that they get to determine in regards to
11:11:27 11 what is admissible evidence. They are keeping it away
11:11:30 12 from the jury and they're not entitled to do it.
11:11:33 13 Optional completeness requires they show it. Fairness
11:11:36 14 requires they show it. And it's their job to show it,
11:11:39 15 difficult or not.

11:11:40 16 So if the business record had shown up as
11:11:42 17 reams of evidence with photographs, they could admit
11:11:44 18 it that way as a business record. But it did not.

11:11:49 19 Their other attempt to get it in over and
11:11:50 20 around hearsay would be to bring an actual human who
11:11:54 21 saw the actual tweet. Would that be cumbersome? Yes.
11:11:57 22 Would it be an exception to hearsay because they can
11:11:59 23 get around it for other reasons? Yes. But they don't
11:12:03 24 get to short circuit it because it's hard. It should
11:12:04 25 be hard. People's liberty is at stake.

11:12:06 1 MR. ARMSTRONG: Your Honor, that was a
11:12:06 2 fantastic speech. But what's going on here, Your
11:12:09 3 Honor, is that they have the underlying data. They
11:12:14 4 have the information. If they want to claim that some
11:12:18 5 photo from five days before they sold is important,
11:12:22 6 have at it, guys. They can do that. And they can
11:12:25 7 introduce some multimedia for some random tweet that
11:12:28 8 we're not even alleging is going to be false. And so
11:12:31 9 a lot of this is just hysterical -- I'm going to be
11:12:35 10 honest -- nonsense, trying to hide the ball and shift
11:12:37 11 it.

11:12:39 12 MR. REYES: Your Honor, briefly. The
11:12:41 13 Garibotti report is trying to portray what PJ Matlock
11:12:46 14 or anyone else said in the public square and was heard
11:12:48 15 by the public. But it's not saying that. It's saying
11:12:52 16 what -- only part of what he said. What he really
11:12:55 17 said was all that, plus a picture of, by the way, this
11:12:59 18 report says this is good. It's not what he said.
11:13:04 19 It's not what the public consumed. It's impartial and
11:13:08 20 it's incomplete.

11:13:10 21 MR. ARMSTRONG: Your Honor, there is zero
11:13:11 22 part of our evidence that is going to turn on a news
11:13:17 23 article. Our case is what the defendants said about
11:13:21 24 their positions and what they expected the stock to do
11:13:24 25 and then what they did in private.

11:13:26 1 If they want to make this case about news
11:13:28 2 articles and links to articles, they are within their
11:13:31 3 rights to do. That's not our case. And both sides
11:13:34 4 get to litigate their case.

11:13:36 5 MS. EPLEY: If that were true, volume
11:13:39 6 charts would be irrelevant. People making money or
11:13:42 7 losing money, including the defendants, would be
11:13:43 8 irrelevant, and this case would be very, very tidy.

11:13:47 9 They would come in and show you the tweet
11:13:49 10 and then they would show you the trading position and
11:13:53 11 they would rest their case. They are not doing that
11:13:55 12 because it's not compelling.

11:13:56 13 Instead, what they want to do is make very
11:13:59 14 legal actions look illegal. It is okay to purchase in
11:14:02 15 unison, knowing it's for your benefit, and sell it.
11:14:06 16 And they want to include that in price structure, but
11:14:08 17 prevent us from showing news articles attached or a
11:14:12 18 girl chugging beer that might go to materiality of
11:14:14 19 whether or not you should follow their tweet.

11:14:17 20 MR. ARMSTRONG: No one is preventing
11:14:18 21 anyone from doing any of that. If they want to raise
11:14:21 22 those issues, they can raise those issues. These are
11:14:23 23 our charts. The methodology is clear. It's
11:14:26 24 admissible evidence.

11:14:28 25 THE COURT: Let me ask you a question.

11:14:34 1 Let's play this out. You've got Ms. Garibotti on the
11:14:41 2 stand. You've asked her about -- let's take one of
11:14:46 3 these. And it's succinct. Yes, this is what the
11:14:52 4 tweet says. And it does say that, because you've
11:14:56 5 accurately summarized some of it. And the defendants
11:15:01 6 get up with the full tweet and say, what about the
11:15:05 7 rest of this?

11:15:06 8 Are you going to object to that?

11:15:10 9 MR. ARMSTRONG: Your Honor, I don't think
11:15:11 10 that's going to be the case, but if they want to do
11:15:13 11 that, sure, they can do that. If they want to say,
11:15:18 12 oh, my gosh, look at this press release that was
11:15:20 13 linked to this tweet, if that's an accurate press
11:15:23 14 release, sure.

11:15:23 15 Again, our case is not press releases.
11:15:25 16 It's about what they said about their positions and
11:15:27 17 where they expected the price to go supposedly at the
11:15:29 18 same time they were selling.

11:15:30 19 THE COURT: Okay. So if you're not
11:15:32 20 objecting to that, let me go back to my original
11:15:37 21 suggestion, which is why don't we admit all the
11:15:40 22 tweets? And have them in notebooks and, you know,
11:15:47 23 then your summary is fine. You can pick and choose
11:15:51 24 whatever you want. They can pick and choose whatever
11:15:54 25 they want. And the jury can decide.

11:16:00 1 MR. ARMSTRONG: So, Your Honor, I think
11:16:02 2 that is throwing the baby out with the bath water a
11:16:06 3 little bit. We're talking about tweets that are in a
11:16:10 4 specific episode. And so to the extent they're making
11:16:14 5 a Rule of Completeness argument, they have the burden
11:16:17 6 to show why something is incomplete.

11:16:20 7 THE COURT: Well, let's say we do all the
11:16:22 8 tweets that are in these pages.

11:16:26 9 MR. ARMSTRONG: Your Honor, I think that's
11:16:27 10 for --

11:16:28 11 THE COURT: I mean, these are pages you
11:16:29 12 guys have said are relevant.

11:16:31 13 MR. ARMSTRONG: So I think that for
11:16:34 14 Ms. Garibotti's charts, what we have done is we have
11:16:37 15 included all of the tweets that have the ticker symbol
11:16:40 16 in them. And so every tweet that has, for example,
11:16:44 17 BBI that we just looked at in Government Exhibit 20,
11:16:46 18 every tweet from Mr. Constantinescu that has "dollar
11:16:49 19 sign BBI" is included in the chart already.

11:16:52 20 And so if there are other tweets that they
11:16:57 21 think are relevant about BBI for Rule of Completeness,
11:17:01 22 it's their burden to show, not ours, why it is
11:17:03 23 relevant and it's necessary to complete the picture.

11:17:09 24 THE COURT: I'm not -- I mean, I'll decide
11:17:12 25 what's relevant. What I'm deciding is let's get

11:17:17 1 beyond this issue. And the way to get beyond it that
11:17:22 2 satisfies everybody is to say if they're -- assuming
11:17:27 3 they're relevant, let's admit all the tweets.

11:17:30 4 MR. ARMSTRONG: Judge, it's impossible for
11:17:31 5 me to evaluate that in a vacuum. There are, as you
11:17:34 6 mentioned, hundreds of thousands of tweets. And for
11:17:38 7 these relevant periods of time, we included in these
11:17:41 8 charts the tweets about the tickers that we're
11:17:44 9 alleging to be --

11:17:45 10 THE COURT: All right. Well, let's admit
11:17:46 11 all the tweets about the tickers.

11:17:49 12 MR. ARMSTRONG: But, Your Honor -- but
11:17:50 13 they're in the charts. That's what I'm saying, Your
11:17:51 14 Honor. The tweets -- the charts --

11:17:53 15 THE COURT: Then it's not the entire
11:17:54 16 tweet.

11:17:55 17 MR. ARMSTRONG: Well, then, if they want
11:17:56 18 to come back and say you should have included this
11:17:59 19 press release, they can do that on cross-examination.
11:18:01 20 That's fine.

11:18:02 21 MS. CORDOVA: It's not the press release.
11:18:04 22 I think Your Honor understands it's the full context,
11:18:06 23 the full statement in the tweet, what he actually --
11:18:07 24 what the people saw when they viewed our clients'
11:18:10 25 tweets.

11:18:12 1 And I think the government's hesitation
11:18:14 2 here is that their case is about nondisclosure. They
11:18:19 3 have alleged that, for example, Mr. Hennessey, when he
11:18:22 4 said "I'm long surf," that that was misleading because
11:18:25 5 he was trying to get people to believe that he was
11:18:27 6 going to hold it for a long time. That's just
11:18:29 7 absolutely not true.

11:18:30 8 At the same time, this is what they've
11:18:34 9 studiously avoided presenting and including in their
11:18:36 10 exhibits. At the very same time in his bio he said, I
11:18:39 11 actively trade positions. I could be buying or
11:18:41 12 selling any stock mentioned at any time. Like I said,
11:18:44 13 not a disclaimer. It's who he is and what he's doing.
11:18:47 14 It's right there. It's a disclosure that he's making
11:18:50 15 to everybody who is viewing his tweets at the same
11:18:52 16 time.

11:18:52 17 And they are studiously, adamantly seeking
11:18:56 18 to keep that from the jury. So that I believe is why
11:18:59 19 Mr. Armstrong is hesitating here.

11:19:02 20 MR. ARMSTRONG: Your Honor, I'm not taking
11:19:03 21 liberties with Ms. Cordova's position, and I would
11:19:07 22 appreciate if she didn't take liberties with mine.

11:19:10 23 I think that what is going on here is that
11:19:11 24 if Your Honor wants to admit those header information
11:19:14 25 on their Twitter profiles, fine. We're going to argue

11:19:17 1 all day that those kinds of statements are misleading
11:19:19 2 part and parcel with everything else that the
11:19:21 3 defendants said. Because what they're not --

11:19:23 4 THE COURT: I missed that. You went too
11:19:25 5 fast. What is misleading?

11:19:27 6 MR. ARMSTRONG: Sure. That, oh, my gosh,
11:19:28 7 look at this Twitter disclaimer that I have on my
11:19:31 8 profile picture. We're going to argue all day, every
11:19:34 9 day, and compellingly that that statement in and of
11:19:37 10 itself is also misleading. Because what they're not
11:19:39 11 doing is they're not saying, hey, guys, what I'm going
11:19:41 12 to do is dump my shares the second I post. And so
11:19:44 13 it's a sleight of hand.

11:19:47 14 THE COURT: No. I understand what your
11:19:48 15 position is. I mean, and I understand what their
11:19:49 16 position is.

11:19:50 17 MR. ARMSTRONG: Exactly. And so if Your
11:19:51 18 Honor is inclined to let those kind of profile
11:19:53 19 pictures in, fine. Let them in. We'll hash it out
11:19:57 20 and win that argument every time.

11:20:01 21 MR. REYES: I'll bet against that, Your
11:20:04 22 Honor.

11:20:04 23 But really briefly I will say that there
11:20:06 24 is a third category here of things that are not
11:20:10 25 in these -- on these posts, which are actually --

11:20:13 1 THE COURT: Which are something really
11:20:14 2 simple?

11:20:15 3 MR. REYES: Very simple. Very simple.

11:20:17 4 In the vein of saying I'm not a financial
11:20:19 5 advisor and things like that, Mr. Matlock actually
11:20:25 6 says things during these episodes contemporaneously
11:20:28 7 that are not in these reports. All right. So if
11:20:30 8 we're going to include the tweets, obviously we would
11:20:33 9 proffer all the tweets that are relevant to this time
11:20:38 10 period that go specifically -- and there is -- you
11:20:40 11 know, it's not hundreds of extra tweets. There's some
11:20:42 12 very specific tweets, for example, in the stock that's
11:20:46 13 ALZN, Mr. Matlock's tweets about trade your own plan
11:20:50 14 and things like that, are completely omitted from the
11:20:54 15 reports.

11:20:55 16 Yes, we could tell -- we can cross-examine
11:20:56 17 the witness on it. But, again, two months later when
11:20:59 18 the jury has these charts in front of them and those
11:21:01 19 tweets aren't in there, you know, who knows what they
11:21:04 20 remember. At the end of the day, all of it is
11:21:06 21 relevant to the state of mind. And we would ask, if
11:21:10 22 we are going to admit the tweets, let's admit all the
11:21:13 23 relevant tweets.

11:21:15 24 MR. ARMSTRONG: Again, Your Honor, this
11:21:16 25 goes to the methodology, which we have discussed at

11:21:18 1 length. Tweets like that are not included in the
11:21:20 2 charts because they don't reference the specific
11:21:22 3 ticker.

11:21:23 4 Again, if they think that there is
11:21:25 5 something in this period of time that is needed for
11:21:28 6 the Rule of Completeness, it's their burden on them to
11:21:31 7 explain why. We cannot talk about this stuff in
11:21:33 8 vacuum when we have 30 tickers that we're talking
11:21:38 9 about and multiple periods of time.

11:21:43 10 If they think that a specific document is
11:21:45 11 relevant in the Rule of Completeness, they have the
11:21:46 12 burden, they have to show it.

11:21:53 13 MR. REYES: We can and we will, Your
11:21:53 14 Honor. But to the extent that -- the cumulative
11:21:54 15 effect is that these documents, as proposed, are
11:21:56 16 misleading to the jury and should not be admissible in
11:21:59 17 the form that they're in.

11:22:01 18 MR. ARMSTRONG: They're not misleading.

11:22:10 19 MS. CORDOVA: And, Your Honor, I'll just
11:22:10 20 note -- I've said it before, but I think it's really
11:22:10 21 important -- the government cannot shift the burden to
11:22:12 22 us to present the evidence that they need to prove
11:22:14 23 their case, and that's what they're doing here.

11:22:17 24 If this case were about invoices and they
11:22:19 25 just went and got the Quicken's database of what date,

11:22:23 1 how much, who it sent to, and then they tried to
11:22:25 2 introduce that as evidence of what the invoice said,
11:22:29 3 nobody would -- that's ridiculous. No. You have to
11:22:32 4 bring the invoice. What did it say? What were the
11:22:34 5 terms? What was written on the invoice?

11:22:36 6 It's the same thing here. They didn't
11:22:37 7 collect the invoices. And so now they're trying to
11:22:39 8 present the jury -- and this is a case about
11:22:42 9 nondisclosure. So they're trying to say this is what
11:22:45 10 the invoice said from the database. But the database
11:22:47 11 didn't collect all the information that was on that
11:22:50 12 invoice.

11:22:50 13 It's the same thing here. And it's their
11:22:52 14 burden, not ours. It's their burden and they can't
11:22:55 15 shift it to us.

11:22:57 16 MR. ARMSTRONG: Judge --

11:23:00 17 THE COURT: It's not their burden, though,
11:23:03 18 is it, to -- if you've got something that -- an
11:23:07 19 objection that something is not complete, isn't it
11:23:10 20 your burden to make that objection and say optional
11:23:13 21 completeness, Judge, you ought to show the entire
11:23:16 22 document?

11:23:17 23 MS. CORDOVA: That's true, Your Honor.
11:23:18 24 But these are not the actual documents. These are not
11:23:20 25 the actual tweets. What they're trying to introduce

11:23:23 1 is bits and pieces, data points, that they have
11:23:26 2 selectively collected, put together in charts and said
11:23:30 3 this is the tweet. It's not.

11:23:32 4 They have the burden to actually present
11:23:33 5 the actual document if that's what they're going to
11:23:36 6 try to convict our clients on.

11:23:39 7 MR. ARMSTRONG: And, Judge, you know, I
11:23:40 8 don't know how many times you want to hear this, but
11:23:42 9 that's what we did. We used search warrant returns.
11:23:45 10 And we put them into the charts. Again, we're just
11:23:48 11 going in circles about this.

11:23:50 12 MR. WILLIAMS: Judge, I have a suggestion
11:23:51 13 more than an argument. I believe there is some
11:23:54 14 talking past each other going on.

11:23:55 15 The search warrant data was produced as a
11:23:58 16 data, not as someone visually would have seen it on
11:24:01 17 Twitter, whether they're on computer or phone. Okay?

11:24:03 18 THE COURT: All right.

11:24:04 19 MR. WILLIAMS: So you're seeing the
11:24:05 20 subtitles without the movie. Now, as the Court has
11:24:11 21 suggested, I have observed everyone's exhibit lists.
11:24:14 22 And they all have hundreds of tweets on them, either
11:24:19 23 screenshots, Wayback Machine, or from the data
11:24:21 24 production pursuant to the search warrant. We could
11:24:23 25 save a lot of time for Your Honor and the jury if we

11:24:27 1 just agree to admit everybody's tweets, all
11:24:31 2 defendants, all prosecution, and then game on in front
11:24:35 3 of the jury.

11:24:37 4 MR. ARMSTRONG: Judge, that is -- that's
11:24:39 5 not even close to the Rules of Evidence.

11:24:39 6 MR. WILLIAMS: Including the Wayback
11:24:39 7 tweets, Your Honor.

11:24:44 8 MR. ARMSTRONG: There are supposed to be
11:24:45 9 Rules of Evidence about hearsay. And a defendant
11:24:48 10 cannot just dump in tens of thousands of his own
11:24:51 11 tweets and use them to prove whatever he wants. We
11:24:55 12 are entitled to use their own statements under
11:24:58 13 801(d)(2)(A). They are not entitled to use their own
11:25:01 14 statements because they're hearsay.

11:25:03 15 If they want to get up and testify on the
11:25:05 16 stand about their own out-of-court statements, they
11:25:09 17 can do that every single day. But they can't just
11:25:12 18 dump in their own statements, thousands of them, and
11:25:13 19 say fair is fair. That's not how the rules work.

11:25:17 20 MS. EPLEY: Because anything that would
11:25:18 21 have been perceived against the defendant from a
11:25:20 22 tweet would have had to be -- I mean, viewed in that
11:25:22 23 context. It goes to the effect on the listener in
11:25:25 24 regards to materiality.

11:25:26 25 There are additional layers and responses

11:25:27 1 that will be developed at trial. But at the very
11:25:29 2 first, at the 10,000-foot view, it's the universe in
11:25:32 3 which anything that they are saying would have been
11:25:34 4 viewed by anyone who cared to watch it.

11:25:36 5 If I acted on that tweet, it is either
11:25:39 6 because I have watched Tommy long enough to know how
11:25:42 7 he trades and what he trades about, in which case
11:25:45 8 these are relevant because it goes to their knowledge;
11:25:47 9 or I don't know him at all, in which case it goes to
11:25:50 10 lack of materiality.

11:25:52 11 MR. FORD: Your Honor, we just published
11:25:54 12 something that I think will be of use to you.
11:25:57 13 These -- we've met and conferred and the government
11:25:59 14 said that they were seeking to exclude every single
11:26:03 15 defense exhibit being offered. That was as far as we
11:26:07 16 got on the meet-and-confer.

11:26:09 17 Now, my client tweeted hundreds and
11:26:14 18 hundreds of time. We've included, I think, about 150
11:26:17 19 examples of my client tweeting things such as this,
11:26:19 20 where he would provide sort of guidance to people who
11:26:21 21 are up and coming and learning how to trade. So in
11:26:24 22 this particular one he says, no, he says, I would do
11:26:26 23 paper trading if you're just starting out.

11:26:28 24 What paper trading is is when you open a
11:26:31 25 brokerage account, such as TD Ameritrade, it allows

11:26:34 1 you to put a fake amount of money in, say, \$100,000
11:26:37 2 and you can just day trade all day. And that way you
11:26:41 3 see, am I losing money? Am I making money?

11:26:43 4 And so what -- one of the things that my
11:26:44 5 client would repeatedly tweet to people is if you're
11:26:48 6 not making money, if you're having a hard time, just
11:26:50 7 do paper trading. And, of course, if somebody is
11:26:53 8 doing paper trading, they're not executing actual
11:26:56 9 transactions in the market and the government's theory
11:26:59 10 falls apart.

11:27:00 11 This is just one of many of the rules of
11:27:02 12 the road that my client was providing to people --

11:27:05 13 THE COURT: Why doesn't this fall into the
11:27:07 14 category, Mr. Ford, that Mr. Armstrong just pointed
11:27:13 15 out, that, you know, if you want to sell that story,
11:27:20 16 have your client get on the stand and say, look how I
11:27:23 17 warned people.

11:27:25 18 MR. FORD: Well, there's multiple -- one
11:27:27 19 that we would like this -- we would like this -- we're
11:27:30 20 going to seek to have this pre-admitted. It is during
11:27:32 21 the conspiracy time period. It is not a hearsay
11:27:35 22 statement. And -- what I heard Your Honor just say is
11:27:40 23 under Rule 106, Rule of Completeness, that we would be
11:27:43 24 permitted to put these in, so --

11:27:49 25 THE COURT: Well, wait a minute. You

11:27:49 1 didn't hear me say that just because one tweet comes
11:27:53 2 in, every tweet comes in.

11:27:56 3 MR. FORD: But this is a tweet --

11:27:58 4 THE COURT: Now I did suggest that. But I
11:28:01 5 didn't see everybody running up and saying, yeah,
11:28:04 6 Judge, we're on board.

11:28:05 7 MR. FORD: Well, Your Honor --

11:28:08 8 MR. DAVIS: We are. Neal Davis on behalf
11:28:10 9 of Deel. We're on board with that.

11:28:11 10 MR. WILLIAMS: We're on board.

11:28:13 11 MR. FORD: We're not on board because of
11:28:15 12 the Sixth Amendment issue, but I will say this tweet
11:28:17 13 has specifically to do with this case and the tickers
11:28:20 14 charged. My client is unequivocally advising people
11:28:25 15 that if they are just starting out and they don't know
11:28:27 16 yet how to trade, that they shouldn't use actual
11:28:30 17 money. It's a reference to the tickers that are in
11:28:32 18 the indictment.

11:28:34 19 MR. ARMSTRONG: Which one?

11:28:35 20 MR. FORD: It's CEI, DATS --

11:28:38 21 MR. ARMSTRONG: That's from 2010.

11:28:38 22 MR. FORD: -- ONTX and --

11:28:41 23 MR. ARMSTRONG: The year before CEI and
11:28:42 24 DATS.

11:28:43 25 MR. FORD: Yeah, you're exactly right. It

11:28:44 1 was published. My client hasn't deleted any of his
11:28:47 2 tweets. You can still see it today. This was what he
11:28:49 3 would routinely post and it --

11:28:51 4 THE COURT: And why do you know it's
11:28:52 5 related to that stock? Because what I see doesn't --

11:28:54 6 MR. ARMSTRONG: It's not. It's not, Your
11:28:56 7 Honor. It is a year and a half before DATS and CEI.
11:28:59 8 And so they're doing slight of hand again saying that
11:29:02 9 this relates to --

11:29:03 10 THE COURT: Let's don't interrupt each
11:29:05 11 other.

11:29:06 12 MR. ARMSTRONG: They're saying that it
11:29:07 13 relates to specific tickers and they're not being
11:29:09 14 accurate with the record. This is from November 2020
11:29:11 15 and DATS and CEI are from 2021 in October.

11:29:17 16 MR. FORD: Well, Your Honor, he's
11:29:19 17 obviously referring to any stocks that he discusses on
11:29:23 18 his Twitter page, and it's not just one tweet buried
11:29:27 19 among many. He does this routinely. You will see
11:29:30 20 examples that are occurring during that time period of
11:29:34 21 these imaginary episodes that the government made up.
11:29:38 22 These are what was happening on Twitter.

11:29:38 23 THE COURT: Okay. I'm taking an aspirin
11:51:27 24 break and I'll be back in 10 minutes. 15 minutes.

11:51:27 25 (Court in recess.)

12:05:13 1 THE COURT: From the government's
12:05:14 2 standpoint, where do we start with your exhibits that
12:05:18 3 don't have anything to do with Twitter?

12:05:25 4 MR. ARMSTRONG: Tough question, Your
12:05:26 5 Honor. Let me check.

12:05:29 6 THE COURT: I'm trying to actually get
12:05:31 7 something accomplished before lunch.

12:05:35 8 MR. ARMSTRONG: The Court's indulgence.

12:05:49 9 Your Honor, just for background, the way
12:05:54 10 Government Exhibit 2 through 20 are just generally
12:05:59 11 organized, is that there is a chart, which is the
12:06:03 12 price and volume chart. There is the B chart, which
12:06:06 13 is the summary chart. Then there's the C chart.

12:06:09 14 If you could please pull up 2C, please,
12:06:11 15 Ms. Kim.

12:06:18 16 So for the substantive counts, we have
12:06:21 17 themes and variation of this chart in 2C, which
12:06:25 18 depicts -- I will also introduce through
12:06:29 19 Ms. Garibotti -- that depicts the operative tweet
12:06:34 20 and -- are you with me, Your Honor?

12:06:35 21 THE COURT: And that gets us to 20. If I
12:06:37 22 ignore all these, that gets us to 20 what?

12:06:42 23 MR. ARMSTRONG: No, I'm sorry, Your Honor.
12:06:42 24 So these are part and parcel of 1 through 20.

12:06:45 25 THE COURT: Okay.

12:06:46 1 MR. ARMSTRONG: And then 21 through 55 are
12:07:01 2 additional summary charts of Ms. Garibotti.

12:07:04 3 So similar to the ones that we're talking
12:07:07 4 about and have been talking about this morning. Then
12:07:10 5 we pick up with messages. So these messages are
12:07:18 6 statements of a party opponent. Under 801(d)(2)(e) --
12:07:24 7 I'm sorry -- 801(d)(2)(a). Or they're a statement of
12:07:28 8 a co-conspirator under 801(d)(2)(e).

12:07:31 9 And so 56 through essentially --
12:07:48 10 essentially the end, with one caveat. For the victim
12:07:51 11 trading records are the defendants' own statements or
12:07:56 12 statements of co-conspirators that we collected,
12:08:01 13 either from Twitter or Discord or Mr. Deel's phone.
12:08:09 14 So there's no easy way to say that --

12:08:18 15 THE COURT: Well, 56 through what?

12:08:20 16 MR. ARMSTRONG: So 56 through 68, for
12:08:20 17 example, are text messages from Mr. Deel's phone.

12:08:26 18 THE COURT: All right. Let's start there.

12:08:27 19 Does anybody object to those?

12:08:29 20 MS. CORDOVA: Your Honor, on behalf of
12:08:32 21 Mr. Hennessey, we object to Government Exhibit 56
12:08:36 22 because it relates to an episode that is outside the
12:08:41 23 54 trial episodes that the government has stated that
12:08:43 24 they would refer to. What the government has done is
12:08:46 25 they've cut off the text message chain -- and I have a

12:08:49 1 copy if that would be helpful.

12:09:07 2 THE COURT: Okay. I have it, counsel. Go
12:09:08 3 ahead.

12:09:09 4 MS. CORDOVA: So what the government has
12:09:10 5 done is they've cut off this text message chain just
12:09:13 6 where my client, Mr. Hennessey, emphasized a message,
12:09:17 7 which means he just put like a little exclamation
12:09:21 8 mark, like a thumbs-up or a thumb-downs, where there's
12:09:24 9 like a little exclamation mark you can put on a
12:09:27 10 message. And what they've left out -- what they've
12:09:37 11 left out of this text message chain is the ensuing
12:09:40 12 conversation that discusses the stock that they
12:09:44 13 decided to trade that day.

12:09:45 14 And why that's important is that the stock
12:09:47 15 they decided to trade that day and -- I say "they," I
12:09:52 16 mean, Ultra calls Gary Deel and Tommy Cooperman was
12:10:00 17 EARS, E-A-R-S, and that is outside the scope of the 54
12:10:06 18 trial episodes that the government has identified.

12:10:12 19 So what they're trying to do is show that
12:10:13 20 my client was involved in talking about a stock they
12:10:15 21 were going to trade, but then -- it's stock that's
12:10:19 22 outside the 54, number one.

12:10:20 23 And then, number two, Mr. Hennessey never
12:10:22 24 traded it.

12:10:25 25 So if they put this in, we would have to

12:10:28 1 put in all this stuff and then we're going way beyond
12:10:30 2 the 54 episodes. So the government has repeatedly
12:10:32 3 stated that they will not introduce evidence of
12:10:35 4 wrongdoing outside the 54 episodes, but that's what
12:10:38 5 this is.

12:10:38 6 Because it's about an episode that is
12:10:40 7 outside the 54. And if they go into it, then we're
12:10:43 8 going to have to go into that episode and I'm going to
12:10:45 9 have to show the jury, look, my client never traded
12:10:49 10 this episode. So the fact that people are talking
12:10:51 11 about all this stuff, he never -- he was never
12:10:52 12 involved.

12:10:56 13 MR. ARMSTRONG: Your Honor, a very simple
12:11:03 14 response. The statement -- these text messages are
12:11:06 15 not being offered for a specific ticker. It's being
12:11:09 16 offered to prove the conspiracy and how the conspiracy
12:11:13 17 worked.

12:11:13 18 On page 1 of Government's Exhibit 56,
12:11:16 19 Mr. Deel says: Let's collaborate and send one
12:11:19 20 tomorrow. And he's saying this to Mr. Hennessey and
12:11:23 21 Mr. Rybarczyk. And then they talk about Mr. Cooperman
12:11:27 22 on the bottom of the page. Now we do one together.

12:11:37 23 And then on page 3, Mr. Deel says: We put
12:11:40 24 out one fire alert and we bail for real. Go silent.
12:11:44 25 And that way each day people are waiting for us.

12:11:51 1 So, Your Honor, this just proves the kind
12:11:55 2 of conversations that the defendants had among
12:11:56 3 themselves. And it proves that they themselves,
12:11:59 4 again, believed in the power of what they were doing.
12:12:01 5 And the power and the impact that it had on the
12:12:05 6 market.

12:12:05 7 These are the kinds of conversations that
12:12:07 8 talk about the exact scheme, what we're going to do,
12:12:11 9 how we're going to do it together, and how it's going
12:12:13 10 to impact other people.

12:12:16 11 MS. CORDOVA: And, Your Honor, the
12:12:20 12 government excised the part that demonstrates that my
12:12:22 13 client actually didn't engage in any trading or
12:12:25 14 trading that they were talking about in this.

12:12:27 15 And the other thing -- so there's multiple
12:12:30 16 objections. That's the main one, this is outside the
12:12:32 17 54. If we bring it in, we have to bring in all the
12:12:34 18 evidence, the full exchange that talks about the stock
12:12:38 19 they actually decided to trade that day and my client
12:12:40 20 didn't trade it. So that's part of it.

12:12:41 21 The other thing is, is that we have the
12:12:44 22 actual printout of the text messages. And it's very
12:12:47 23 different from what the government has sort of copied
12:12:49 24 and pasted together and put -- they put at the top of
12:12:53 25 that exhibit, Mitch Hennessey. There's no evidence

12:12:57 1 that Mitchell Hennessey ever saw a tweet on the 2nd of
12:13:01 2 June. He didn't text. He didn't respond. And this
12:13:05 3 is a group chat, for all we know he had it silenced
12:13:09 4 and he never viewed anything. He only emphasized one
12:13:12 5 tweet on the 3rd.

12:13:13 6 And the government's -- the way they've
12:13:15 7 put this together is it shows -- they've put at the
12:13:17 8 top that it's June 2nd. But if you look closely --
12:13:20 9 and you'll have to use the magnifying glass -- he
12:13:23 10 actually doesn't even respond to anything until the
12:13:24 11 3rd.

12:13:25 12 And then on the 3rd, after he emphasized
12:13:27 13 it, then everyone -- other people, and I don't want to
12:13:30 14 speak for other people -- but other people, not
12:13:32 15 Mr. Hennessey, start talking about what stock they
12:13:34 16 think would be good to trade. Mr. Hennessey never
12:13:37 17 traded. And it's one of the stocks outside the 54.

12:13:39 18 So the government wants to put in half of
12:13:41 19 it to make it show like these people are conspiring
12:13:44 20 together. If they do that, we're going to have to go
12:13:46 21 into the whole thing and then we're outside the 54,
12:13:49 22 which is what they have promised over and over again
12:13:51 23 they wouldn't do, but that's where we end up.

12:13:53 24 And it's also misleading for them to put
12:13:56 25 the testimonial statement at the top, the date -- the

12:13:58 1 dates on the actual evidence. They could put the
12:14:00 2 evidence in. So they can't put the date. It's also
12:14:05 3 not accurate because didn't -- Mr. Hennessey wasn't
12:14:08 4 part of the conversation on the 2nd; as well as
12:14:10 5 Mr. Hennessey being a participant, because they have
12:14:12 6 no evidence that he saw anything on the 2nd.

12:14:15 7 MR. ARMSTRONG: Your Honor, the standard
12:14:16 8 is --

12:14:18 9 THE COURT: What other objections are
12:14:20 10 there?

12:14:22 11 MR. ROSEN: Sure. We filed a motion about
12:14:26 12 the co-conspirator statement, so Exhibit 59 falls
12:14:30 13 within that motion. I'm happy to address one,
12:14:33 14 multiple, or however you want to do it. I just wanted
12:14:35 15 to make sure we preserve our objection to 59, which my
12:14:38 16 client is not part of. There's a throwaway reference
12:14:42 17 to him about pumping.

12:14:45 18 THE COURT: Okay. I'm missing this. 59
12:14:47 19 what?

12:14:50 20 MR. ROSEN: Exhibit 59.

12:14:50 21 THE COURT: We're on 56.

12:14:54 22 MR. ROSEN: Right, right. Yeah. Weren't
12:14:59 23 we doing this -- okay. Let me --

12:15:02 24 MR. BROWN: Your Honor, Matlock will just
12:15:06 25 join the objection for outside of the scope of the 54

12:15:09 1 episodes.

12:15:13 2 THE COURT: Okay. How many of these are
12:15:14 3 going to be outside of the 54?

12:15:18 4 MS. CORDOVA: Many.

12:15:19 5 MR. ARMSTRONG: Your Honor, we charged a
12:15:20 6 conspiracy. We are allowed to prove the relationship
12:15:22 7 between the parties. That is what we're doing.

12:15:25 8 THE COURT: I know, but I thought that was
12:15:26 9 the purpose of the 54. The extra 35 were going to be
12:15:32 10 concerning those to prove the conspiracy. I mean,
12:15:37 11 that was the argument for the extra 35 and we're
12:15:40 12 limiting that to the 54. And I didn't pick the 54
12:15:43 13 number.

12:15:44 14 MR. ARMSTRONG: Of course.

12:15:45 15 THE COURT: But we were doing it to, you
12:15:48 16 know, make it a case that was presentable to a jury
12:15:50 17 and some time in the 2024 calendar year.

12:15:55 18 MR. ARMSTRONG: Your Honor, they've
12:15:56 19 already made arguments that you cannot infer anything
12:15:58 20 just based on trading alone. And so the fact that one
12:16:02 21 defendant was trading in a stock with somebody else
12:16:05 22 tells you nothing. These kind of private
12:16:07 23 communications among themselves proves the conspiracy,
12:16:10 24 and it proves the relationship between the parties.
12:16:16 25 It proves exactly what they believed about their

12:16:18 1 messages they put into the market.

12:16:19 2 THE COURT: I'm not arguing with you about
12:16:24 3 that. What I'm asking is, I thought we were limiting
12:16:26 4 it to 54 stocks.

12:16:27 5 MR. ARMSTRONG: We are. Of course, Your
12:16:28 6 Honor. And this doesn't have any reference to a stock
12:16:30 7 on it. And so we're not pointing to some stock
12:16:33 8 outside of our 54 in this exhibit.

12:16:36 9 THE COURT: Okay. But I'm hearing that if
12:16:39 10 you read the whole thing, it's pertaining to another
12:16:42 11 stock.

12:16:44 12 MR. ARMSTRONG: That may be true, Your
12:16:44 13 Honor. And, again, it goes back to what we talked
12:16:47 14 about before, before the break, which is if they're
12:16:49 15 going to make a Rule of Completeness argument, they
12:16:51 16 need to put their money where their mouth is and
12:16:55 17 actually show what actually makes this incomplete for
12:16:58 18 the reason that we're offering it. And they're just
12:17:01 19 talking in the abstract to try to exclude things,
12:17:03 20 which is improper.

12:17:08 21 MR. FORD: We're going to pull up an
12:17:11 22 example just to elucidate what's happening a little
12:17:13 23 bit more clearly.

12:17:15 24 MR. ARMSTRONG: Your Honor, if the Court
12:17:16 25 would indulge me, Mr. Constantinescu is not even on

12:17:18 1 this tweet. If we could have some guidelines as to
12:17:20 2 who can object to exhibits that we're actually
12:17:22 3 discussing.

12:17:22 4 MS. EPLEY: I'd be happy to.

12:17:28 5 MR. FORD: So this is -- this is yet
12:17:32 6 another example, and we're going to see dozens and
12:17:35 7 dozen of these. And this one, this is the original
12:17:38 8 data. They're attributing it to Mr. Hrvatin and
12:17:42 9 Mr. Cooperman.

12:17:43 10 It says: We need GIX to do it.

12:17:46 11 So just to be clear, GIX is not even a
12:17:48 12 registered security and, therefore, could not form the
12:17:51 13 foundation of a charge under 1348 or 1349. It's a
12:17:55 14 ticker not only outside of the episodes, but that
12:17:57 15 could not possibly form the foundation.

12:17:59 16 Now, Mr. Hrvatin says: If we all load up,
12:18:02 17 we can move anything; to which I believe Mr. Cooperman
12:18:06 18 responds: I can bend the spoons with my mind, but
12:18:10 19 only when I'm high.

12:18:12 20 Now, if you go back to the original -- it
12:18:18 21 says: I also come up with business ideas when I'm
12:18:20 22 high, but then I forget ha, ha.

12:18:22 23 If you go to the government's actual
12:18:25 24 exhibit, they have only included the top three lines:
12:18:28 25 We need GIX to do it. Giant game to follow. If we

12:18:32 1 load up we can move anything.

12:18:34 2 So while we understand this is
12:18:36 3 cross-examination material, the problem here is GIX is
12:18:39 4 outside of the episodes. It's not a registered ticker
12:18:42 5 and the government has actually manipulated this
12:18:45 6 conversation where people are joking to make it seem
12:18:48 7 like there was some sort of misconduct.

12:18:51 8 THE COURT: They might be doing you a
12:18:53 9 favor, keeping drug use out from in front of the jury.

12:18:55 10 MR. ARMSTRONG: Exactly. Does
12:18:56 11 Mr. Hrvatin's attorney want us to introduce that he
12:18:59 12 was high all the time? We're happy to do that if he
12:19:00 13 wants to. We could stipulate to that.

12:19:01 14 MR. FORD: Mr. Hrvatin didn't say that,
12:19:03 15 but -- nor did any of the co-defendants, which raises
12:19:07 16 the other problem, which is we have dozens and dozens
12:19:10 17 of these exhibits where there is people on them who
12:19:14 18 I've never heard of and I don't know who they are. We
12:19:17 19 just skipped past -- we skipped -- we fast forwarded
12:19:20 20 to Exhibit 56 --

12:19:23 21 THE COURT: We did that at my request.

12:19:29 22 MR. FORD: But contained within those are
12:19:31 23 other examples of what we're saying. By the way, this
12:19:33 24 purports that Mr. Constantinescu, Mr. Matlock,
12:19:36 25 Mr. Hrvatin, and Mr. Knight and other individuals were

12:19:38 1 part of this conversation. They don't appear anywhere
12:19:40 2 on the government's exhibit.

12:19:43 3 They've just fabricated demonstratives
12:19:45 4 where they've included the names of everybody on the
12:19:47 5 top of the exhibit, without any evidence that anybody
12:19:49 6 participated in the conversation.

12:19:51 7 MR. ARMSTRONG: Your Honor, again, that is
12:19:52 8 a gross fabrication of the record. This is a Twitter
12:19:54 9 group chat that all of the people that are listed on
12:19:57 10 the header are in.

12:20:02 11 MR. FORD: Your Honor, so -- and I
12:20:05 12 understand we've moved to Exhibit 56. But this is an
12:20:08 13 endemic problem of using tickers outside of the 54.
12:20:11 14 It's an endemic problem of relying on tickers that are
12:20:14 15 not even --

12:20:14 16 THE COURT: All right. Let's go to an
12:20:15 17 exhibit that's inside the 54 that the Court might
12:20:18 18 actually admit.

12:20:20 19 MR. ARMSTRONG: So, Your Honor, the
12:20:22 20 tickers in the 54, the relevant message for those
12:20:31 21 tickers are in two places: Number one, they're
12:20:36 22 embedded in the summary charts of Ms. Garibotti. And
12:20:39 23 then the actual underlying record itself is normally
12:20:42 24 attached as a C, D, or E after that -- knowledge.

12:20:46 25 THE COURT: Okay. Well, I'll come back to

12:20:47 1 those. But, I mean -- so none of these other exhibits
12:20:49 2 have to do with any of the 54 stocks?

12:20:52 3 MR. ARMSTRONG: I'd have to go back and
12:20:55 4 look. There may be one or two references to like SURF
12:20:57 5 and RGLS off the top of my head, but, again, Your
12:21:02 6 Honor, we really should go through these, because they
12:21:04 7 provide critical context about the relationship to the
12:21:06 8 parties. And they prove up the conspiracy that we
12:21:09 9 have charged. And it shows that they were close
12:21:12 10 associates and did this together.

12:21:16 11 THE COURT: Here's my problem with that,
12:21:20 12 counsel, is I don't disagree with you that they show
12:21:21 13 what you say they show. Or at least can be
12:21:24 14 interpreted that way. At least the couple I've looked
12:21:29 15 at.

12:21:30 16 But the problem is, I mean, we've had like
12:21:33 17 three hearings where we're saying we're cutting it
12:21:36 18 down to 54 stocks. And so defendants are prepared to
12:21:39 19 address 54 stocks. And this one wasn't one of them.

12:21:43 20 MR. ARMSTRONG: Your Honor, we can
12:21:44 21 stipulate that this one is not one of them. I mean,
12:21:48 22 on Exhibit 56, the stock isn't even referenced in the
12:21:51 23 excerpt that we're offering.

12:21:53 24 And so, again, we're arguing about an
12:21:55 25 issue that we're not even offering the exhibit for.

12:21:58 1 We're not putting the trading at issue in Government
12:22:02 2 Exhibit 56. Again, we're offering it to show
12:22:07 3 something totally different, which is the relationship
12:22:09 4 between the parties and how they believe they had the
12:22:12 5 impact on the market, which is what we alleged.

12:22:18 6 MS. CORDOVA: Your Honor, they're offering
12:22:20 7 it to show wrongdoing on the part of my client. And
12:22:23 8 they said that there would not be evidence of
12:22:26 9 wrongdoing outside the 54. Now, we can go into it and
12:22:29 10 we can put the whole text message in and we can show
12:22:31 11 the jury, look, Mitch never traded EARS. He didn't --
12:22:36 12 he was in this text message, because he emphasized one
12:22:39 13 thing, whether he saw the messages before or the
12:22:41 14 messages after, we don't know, but we do know he never
12:22:44 15 traded it.

12:22:44 16 It's just that is going to prolong this
12:22:46 17 case and we -- the government told us in September
12:22:49 18 these are the 54 we have to look forward to. These
12:22:52 19 are the 54 we have to worry about. We would have a
12:22:55 20 ton of work to do to get ready for all these other
12:22:57 21 episodes and there are a lot.

12:22:59 22 MR. ARMSTRONG: Your Honor, there is no
12:23:00 23 other episode. The statement is primarily being
12:23:02 24 offered against Mr. Deel and his own words on the
12:23:05 25 first two lines --

12:23:05 1 THE COURT: No, I understand why you're
12:23:06 2 offering it. I mean, I think it's clear why you're
12:23:09 3 offering it. But the question -- my problem is, it's
12:23:14 4 outside the scope of what I thought everybody had
12:23:17 5 agreed to.

12:23:19 6 MR. ARMSTRONG: Your Honor, I would really
12:23:20 7 disagree with that statement. It's not outside the
12:23:23 8 scope. It's offered for a completely different
12:23:27 9 reason.

12:23:30 10 MR. DAVIS: Judge, Neal Davis for
12:23:31 11 Mr. Deel. He's referring to my client.

12:23:32 12 We object because we've been prepared for
12:23:34 13 the 54 episodes that we were told repeatedly were
12:23:39 14 going to be possibly in play for a trial. I was
12:23:43 15 hoping that we could maybe try this case in eight
12:23:46 16 weeks or less.

12:23:48 17 At this point, if we're going to start
12:23:50 18 going off -- because we went from the original charged
12:23:53 19 ones to 54, because they wanted some more to throw in
12:23:57 20 there. But now we're going beyond those. And it's
12:23:59 21 just not fair.

12:24:01 22 I mean, I don't know how else to put it.
12:24:03 23 And we're going to be here forever. So my request is
12:24:07 24 that they be limited to the 54 charges. And under
12:24:10 25 401, 403, these are the ones who are not --

12:24:15 1 MR. ARMSTRONG: Your Honor --
12:24:15 2 MR. DAVIS: Can I just finish? I haven't
12:24:16 3 even talked in two days.

12:24:16 4 MR. ARMSTRONG: I apologize.
12:24:17 5 MR. DAVIS: I know. It's my client. It's
12:24:19 6 my client and everyone has been talked but me. And --
12:24:24 7 So, anyway, Judge, Mr. Deel -- so I agree
12:24:28 8 with the Court. And I just don't -- it's just seems
12:24:32 9 bordering on the ridiculous, so...
12:24:36 10 MR. ARMSTRONG: Your Honor, if they're not
12:24:37 11 going to argue that their statement didn't have an
12:24:39 12 impact on the market, we can withdraw this exhibit,
12:24:43 13 right.

12:24:43 14 But their whole argument is their tweets
12:24:46 15 didn't move anything at all and that is directly
12:24:48 16 contradicted by this exhibit. So that's why we're --

12:24:51 17 THE COURT: Didn't you say yesterday say
12:24:53 18 you're not arguing -- the government is not arguing
12:24:54 19 that the tweets made a difference? You're not arguing
12:24:58 20 it made the price go up?

12:24:59 21 MR. ARMSTRONG: It made a difference to
12:25:01 22 them and that's why they did it. And that's exactly
12:25:03 23 what this proves. And we're going to have people
12:25:07 24 testify who were doing this with them and observing it
12:25:09 25 in realtime that the tweet would come out and the

12:25:12 1 price would pop.

12:25:15 2 MR. DAVIS: It's been a shifting target
12:25:17 3 the entire time, not only the government's theory, but
12:25:20 4 now exhibits. I mean, it depends on which hour of
12:25:22 5 which day you ask the government what their theory is.

12:25:33 6 THE COURT: Okay. And am I understanding
12:25:42 7 that 56 through 340 don't concern the 54 stocks?

12:25:49 8 MR. ARMSTRONG: Your Honor, for example,
12:25:51 9 57 -- I mean, we can go through them if Your Honor
12:25:52 10 would like. It's difficult to talk about this in the
12:25:54 11 abstract.

12:25:55 12 Exhibit 57 is another critical point to
12:25:58 13 the conspiracy. It's Mr. Hennessey this time in
12:26:03 14 his -- I'll wait till you get there.

12:26:05 15 THE COURT: I've got it.

12:26:06 16 MR. ARMSTRONG: Here it's Mr. Hennessey in
12:26:08 17 his own words talking to Mr. Cooperman and Mr. Deel in
12:26:12 18 the middle of the conspiracy in 2021: There's legit
12:26:16 19 no point in me alerting shit unless it's to help you
12:26:19 20 guys.

12:26:19 21 That is the thrust of the conspiracy.
12:26:23 22 They are alerting things to help themselves and then
12:26:25 23 telling the followers: Hey, guys, we're looking out
12:26:27 24 for you, you're our family, you can trust us.

12:26:30 25 In Mr. Hennessey's own words he explains

12:26:32 1 exactly why he alerts things: To help his
12:26:35 2 co-conspirators.

12:26:42 3 THE COURT: Is this one of the 54 stocks
12:26:43 4 they're talking about?

12:26:45 5 MR. ARMSTRONG: I have no idea, Your
12:26:46 6 Honor. That's not the reason why we're offering it.

12:26:48 7 We're offering it, again, to show the
12:26:50 8 relationship between the parties and how the
12:26:52 9 conspiracy operated.

12:27:01 10 MR. ROSEN: One significant byproduct of
12:27:03 11 the going outside the 54, and it does impact 54, my
12:27:08 12 client's not on that. He's not on a lot of these.
12:27:11 13 He's on actually very few. There's a real multiple
12:27:14 14 conspiracy problem here. There are different groups
12:27:15 15 breaking off, as my client is part of Sapphire, not
12:27:18 16 being part of Atlas.

12:27:20 17 I mean, it's going to be chaos trying to
12:27:23 18 figure out what conspiracy is this, who is part of the
12:27:25 19 alleged conspiracy and how do you even define this to
12:27:27 20 the jury.

12:27:27 21 So as we do go forward in these text
12:27:30 22 messages, I just want to ask Your Honor to keep that
12:27:31 23 in mind.

12:27:39 24 THE COURT: I'm concerned whether we're
12:27:40 25 ready for trial.

12:27:40 1 MS. CORDOVA: Your Honor, we're ready.

12:27:41 2 We're ready on the 54. We've spent a lot of time
12:27:44 3 getting ready.

12:27:46 4 MR. ARMSTRONG: Your Honor, this is no
12:27:47 5 surprise to anybody. This is what we alleged in the
12:27:49 6 indictment. This is exactly how the conspiracy is
12:27:52 7 working. This is exactly how --

12:27:53 8 THE COURT: Well, it's a surprise to me.

12:27:55 9 Okay? Because I thought we were limiting testimony to
12:27:59 10 54 stocks.

12:28:01 11 MR. DAVIS: And for the record, it's a
12:28:01 12 surprise to me as well. I thought we were limiting it
12:28:03 13 to 54. Ms. Cordova, I remember specifically said up
12:28:06 14 here on several occasions, they're going to try to go
12:28:08 15 outside the 54; the government said no. And it's in
12:28:12 16 pleadings as well and here we are.

12:28:13 17 You know, this is not a very complicated
12:28:17 18 case. It's a fraud case. It's a criminal fraud case.
12:28:20 19 They've got plenty of allegations in the indictment
12:28:23 20 they can rely on. They've got 54 other charges they
12:28:26 21 can rely on. Now we've got to go beyond all that?

12:28:29 22 I mean, it's just -- to me, it's just not
12:28:31 23 fair to the defense. And it's just a due process
12:28:34 24 violation. It doesn't follow the Court's order.

12:28:49 25 MR. ARMSTRONG: Again, Your Honor, I can

12:28:50 1 give you more specific examples of why each one of
12:28:52 2 these is critically relevant.

12:28:54 3 THE COURT: I'm not fussing you with about
12:28:56 4 the relevance. I could see why you say, when he says,
12:29:01 5 hey, let's get together and do X, I mean, that proves
12:29:04 6 conspiracy. We're getting together and doing
12:29:06 7 something. I understand the relevance.

12:29:09 8 It's the surprise factor that I'm not
12:29:16 9 happy with.

12:29:19 10 MR. FORD: Your Honor, the surprise factor
12:29:24 11 is based on the deficiencies in their case.

12:29:30 12 These -- one, these conversations do not
12:29:32 13 support the notion of a conspiracy. Because what
12:29:34 14 they're talking about is not unlawful conduct.

12:29:37 15 So I disagree with Your Honor in that
12:29:39 16 regard. And we will stand prepared to present what
12:29:44 17 they're actually talking about --

12:29:46 18 THE COURT: Well, I think that would be
12:29:48 19 for the jury to decide, quite frankly.

12:29:48 20 MR. FORD: Exactly.

12:29:50 21 THE COURT: Set that part aside.

12:29:52 22 MR. FORD: Right. But what has happened
12:29:55 23 in this case is they lack sufficient evidence to make
12:30:01 24 a showing of a conspiracy.

12:30:03 25 So they've pieced together these disparate

12:30:07 1 conversations in groups. And it takes hundreds of
12:30:10 2 individual irrelevant exhibits that are outside the
12:30:12 3 scope of their case so that they can confuse the jury
12:30:16 4 with sheer volume.

12:30:17 5 As you see, of the eight co-defendants, or
12:30:24 6 nine in this case, six are not present in this
12:30:25 7 conversation. And it appears to -- it appears to do
12:30:31 8 with a stock that's been never mentioned before by the
12:30:33 9 government.

12:30:34 10 On top of it, we are not talking about an
12:30:36 11 18 U.S.C. 371 conspiracy where they can prove wrongful
12:30:40 12 or lawful conduct. The plain language of 1349 is the
12:30:44 13 conspiracy has to be -- the object has to be the
12:30:47 14 commission of a 1348 offense.

12:30:49 15 And 1348 is expressly tied to a specific
12:30:56 16 security registered under Rule 12 of the securities
12:30:59 17 law. It's not a 371 conspiracy. They did not charge
12:31:03 18 that.

12:31:06 19 This is the issue with them introducing,
12:31:08 20 not only the additional 35 above the 19, but now
12:31:11 21 trying to include hundreds of others, including the
12:31:14 22 example I just showed of GIX, which is not even a
12:31:17 23 registered security.

12:31:20 24 MR. ARMSTRONG: Your Honor, just very
12:31:24 25 quickly, maybe this will eliminate the point. Maybe

12:31:24 1 not, but I'll give it to Your Honor.

12:31:26 2 Government Exhibit 77, please, Ms. Kim.

12:31:42 3 This is a critical exchange between

12:31:44 4 Mr. Hennessey and Mr. Constantinescu. It's from

12:31:46 5 Discord. And Mr. Constantinescu is teaching

12:31:51 6 Mr. Hennessey exactly what to do.

12:31:53 7 And it's not being offered for any

12:31:55 8 specific ticker. It doesn't reference a specific

12:31:59 9 ticker. But, lo and behold, what happens here is that

12:32:01 10 they do this exact thing with ONTX one month later.

12:32:04 11 So, again, it's critical evidence that

12:32:07 12 explains exactly what we charged.

12:32:10 13 MR. FORD: Your Honor, under Rule 106,

12:32:12 14 Rule of Completeness, when the jury sees this, we will

12:32:15 15 show that full exchange where you will see that this

12:32:18 16 is surrounded by ha, ha, ha, ha and they quote to a

12:32:24 17 link to an individual, who is not a party to this

12:32:28 18 case, who has posted on Discord saying: Hey, please

12:32:31 19 come join my paid chatroom, and I will give you the

12:32:36 20 best alerts. And if you do it by today at 4 p.m.,

12:32:41 21 I'll give you a discount on it.

12:32:42 22 So they forward this link to one another,

12:32:44 23 and then they're commenting on it by saying: Isn't

12:32:47 24 this hilarious? This guy is charging you money to go

12:32:49 25 to his room. But we all know he's going to front-load

12:32:54 1 and do these stocks. They're not referring to what
12:32:56 2 they're doing. They're making fun of an individual
12:32:58 3 who charges people money.

12:33:00 4 It was the function of the Atlas Discord
12:33:06 5 room that Mr. Matlock and Constantinescu created, the
12:33:10 6 purpose of it was to essentially push back and beat
12:33:12 7 back these individuals who were using paid chatrooms
12:33:16 8 in order to con people. They are making fun of that
12:33:19 9 process.

12:33:19 10 It was the function of the creating a free
12:33:21 11 chatroom. It is absolutely unbelievable that we are
12:33:29 12 required under Rule 106 to introduce this complete
12:33:31 13 statement and that the government is being allowed to
12:33:32 14 pull out the context of the laughter and joking and
12:33:34 15 citing to websites and so forth.

12:33:40 16 We can certainly pull it and show you --

12:33:42 17 MR. ARMSTRONG: Hey, Your Honor, I think
12:33:43 18 we should do that. I think we should do that. It
12:33:44 19 would be very helpful for everybody.

12:33:50 20 THE COURT: Let me say before you start
12:33:54 21 that I view general conversations, not about any stock
12:34:01 22 but about what we're doing, I don't view those in the
12:34:06 23 same way that I view the non-54 stocks. So I don't
12:34:10 24 consider those surprises.

12:34:13 25 MR. ARMSTRONG: I'm sorry, Your Honor, I

12:34:14 1 didn't follow.

12:34:15 2 THE COURT: Well, if you've got evidence
12:34:17 3 that doesn't pertain to one of the non-54 stocks, but
12:34:27 4 doesn't pertain to any stock in particular, like
12:34:29 5 that's what I understood you to say, that this exhibit
12:34:33 6 didn't pertain to any stock, it was just general
12:34:36 7 chit-chat.

12:34:39 8 And it's -- if they're huddling up saying,
12:34:43 9 let's get together and I'll buy this stock on the QT
12:34:47 10 and then pump it up and sell it, that's not a
12:34:51 11 surprise. I see that differently because that's just
12:34:56 12 a general statement in furtherance of the conspiracy
12:34:59 13 and I think that is fine.

12:35:02 14 My problem was with statements about
12:35:06 15 stocks that we told the defendants that weren't in
12:35:11 16 play.

12:35:11 17 MR. ARMSTRONG: But, again, Your Honor,
12:35:12 18 just to make sure we're on the same page, we can
12:35:17 19 excise any reference to another stock. I don't think
12:35:20 20 they are a lot of them. There might be, like, one or
12:35:22 21 two. But, again, it goes to the reason why Your Honor
12:35:26 22 just explained. It doesn't go to the underlying
12:35:29 23 trading and so --

12:35:29 24 THE COURT: No. I understand why you want
12:35:31 25 it. I'd want it too if I was in your shoes.

12:35:37 1 MR. FORD: Your Honor, not only does this
12:35:38 2 conversation not pertain to a particular stock, it is
12:35:42 3 specifically mocking an individual who has a paid
12:35:44 4 chatroom.

12:35:45 5 THE COURT: Well, that's a different
12:35:46 6 topic.

12:35:48 7 MR. FORD: Well, no, it's the same that in
12:35:49 8 the sense that if we're limiting the ruling to these
12:35:51 9 conversations have to do with, hey, let's get together
12:35:54 10 and do this one of the 54, then this conversation does
12:35:57 11 not pertain to that. It must be excluded under that
12:36:01 12 ruling.

12:36:01 13 THE COURT: Well, I mean, I've -- letting
12:36:07 14 in the entire thing is a different animal, a different
12:36:10 15 objection. Right now I'm talking about relevance.
12:36:16 16 And by relevance I don't mean relevance to the cause
12:36:18 17 of action, I mean relevance to the 54 stocks and/or
12:36:23 18 the conspiracy with regard to those 54 stocks.

12:36:27 19 MR. FORD: Understood. Then the
12:36:28 20 government should bear the burden of having to prove
12:36:30 21 that this conversation concerns one of the 54 tickers.
12:36:34 22 It does not. They can't.

12:36:48 23 MR. ARMSTRONG: So, Your Honor, Ms. Kim
12:36:49 24 has pulled up the original, like, what we call the
12:36:51 25 native Government Exhibit 77. And so you see --

12:37:03 1 MR. WILLIAMS: What number was that? I
12:37:06 2 couldn't hear.

12:37:06 3 MR. ARMSTRONG: Government's Exhibit 77.

12:37:07 4 MR. WILLIAMS: 77. Thank you.

12:37:09 5 MR. ARMSTRONG: Here are the messages that
12:37:11 6 we included: Dude, this is the plan from now on. We
12:37:14 7 load quietly everything on the cheap and alert days
12:37:18 8 later.

12:37:18 9 Mr. Hennessey says: Yes. No scanner
12:37:21 10 pickups. Nope. No big leaps of us loading.

12:37:26 11 THE COURT: Give me your interpretation of
12:37:28 12 no scanner pickups, just for my own edification.

12:37:32 13 MR. ARMSTRONG: Of course. So what
12:37:33 14 happens is there are people out there that monitor
12:37:36 15 just the buys and the sells of stocks.

12:37:38 16 THE COURT: Okay.

12:37:39 17 MR. ARMSTRONG: And so if someone places a
12:37:41 18 large order to buy, that could be alerted in what's
12:37:44 19 called a scanner, where someone just sees a general
12:37:47 20 activity and they see an uptick in activity in a
12:37:51 21 specific stock.

12:37:52 22 So the scanner will pick up a large buy as
12:37:55 23 an indicator of a large interest. And so they'll
12:37:59 24 break up their buys to not alert their scanners so
12:38:02 25 other people wouldn't buy as a result.

12:38:05 1 But the point of this is that -- again,
12:38:07 2 this happens a lot -- there is no reference to what
12:38:09 3 Mr. Ford is talking about. So we can scroll down.
12:38:14 4 The reason why it's offered is for one specific
12:38:16 5 reason.

12:38:17 6 MR. FORD: The reference is right there.
12:38:20 7 Ha, ha, ha, ha, ha, Dog. Video about it. I watched
12:38:25 8 it 100 times. I know, lol. And then the citation to
12:38:29 9 that link, twitter.com/ -- it lists a name, it says
12:38:34 10 status and lists a series of numbers.

12:38:35 11 Now, the government claims that they can't
12:38:37 12 obtain that link. But they can obtain that link. We
12:38:40 13 have it. We'll pull it up for you. It's available on
12:38:42 14 Wayback Machine. And it is a link to an individual
12:38:46 15 who is suggesting that if you, by 4 p.m., join his
12:38:52 16 chatroom, he will give you a discount on the price
12:38:55 17 that it cost to join that chatroom.

12:38:57 18 I understand, Your Honor, that these are
12:38:59 19 competing interpretations of the conversation. We
12:39:03 20 certainly disagree with how they're using "scanner."

12:39:06 21 But the context of this occasion is a joke
12:39:11 22 in relation to this individual. It happens all within
12:39:15 23 a span of a couple minutes. This conversation occurs
12:39:19 24 over a period of less than five minutes.

12:39:23 25 It's the next link down, if we go down to

12:39:27 1 this one at 12:07:49. I know, lol. And then the link
12:39:37 2 underneath that, when you click on that link, it will
12:39:40 3 go to a Twitter post where an individual is promoting
12:39:45 4 a page. It is one of the fundamental aspects of our
12:39:50 5 defense in this case.

12:39:51 6 But to answer the question, this is what
12:39:57 7 it would look like if you tried to go to Twitter. So
12:39:59 8 the government has said that it's unavailable, but you
12:39:59 9 are --

12:39:59 10 (Counsel speaking simultaneously.)

12:40:07 11 MR. FORD: -- you are able to obtain this
12:40:08 12 simply by going to Wayback Machine, and so we --

12:40:13 13 THE COURT: So we get the joker? Is that
12:40:15 14 what you're telling me?

12:40:18 15 MR. FORD: Well, yeah. We're -- can we --

12:40:20 16 THE COURT: No. There's a video of the
12:40:21 17 joker on the --

12:40:24 18 MR. FORD: Yeah. Well, my client was
12:40:25 19 certainly a jokester. I'm going to pass something
12:40:28 20 back to you. We won't be able to put it on the
12:40:31 21 screen, but that's okay.

12:40:47 22 The function and purpose of Atlas
12:40:50 23 Discord -- and I'm not saying it was directed at this
12:40:52 24 individual, but the function of creating a free
12:40:54 25 chatroom with free advice was to get people out of the

12:40:56 1 paid chatroom who they believed they were taking
12:40:59 2 advantage of them. And so that is the joke. And that
12:41:01 3 is what they are talking about in this context.

12:41:04 4 But, again, it has nothing to do with the
12:41:07 5 general conspiracy. And it has nothing to do with any
12:41:10 6 of the 54 stock tickers that we prepared. This is,
12:41:14 7 again, this is endemic, Your Honor. We're going to
12:41:16 8 see this in I think literally hundreds of exhibits
12:41:18 9 coming up here that they have nothing to do with the
12:41:22 10 case as we've prepared for.

12:41:25 11 MR. ARMSTRONG: Your Honor, Mr. Gentile in
12:41:26 12 this tweet has nothing to do with this case.

12:41:26 13 THE COURT: I'm sorry?

12:41:28 14 MR. ARMSTRONG: Mr. Gentile --

12:41:30 15 MR. FORD: Yeah, Mr. --

12:41:30 16 MR. ARMSTRONG: Excuse me, sir.

12:41:32 17 MR. FORD: Can we not use the name of the
12:41:35 18 individual?

12:41:36 19 MR. ARMSTRONG: It's on his Twitter
12:41:38 20 profile.

12:41:39 21 MR. FORD: I understand that. He also
12:41:41 22 happens to -- it is not relevant to this conversation
12:41:44 23 to put the individual on record. And I would --

12:41:45 24 THE COURT: It may be relevant to me
12:41:47 25 understanding.

12:41:47 1 Go ahead.

12:41:48 2 MR. ARMSTRONG: I don't understand what

12:41:49 3 that objection is, but regardless --

12:41:55 4 MR. FORD: To the extent --

12:41:56 5 (Parties speaking simultaneously.)

12:41:57 6 THE COURT: Let the government finish.

12:41:59 7 MR. FORD: Can we seal -- if we're going

12:42:00 8 to use his name, can we please seal it?

12:42:02 9 MR. ARMSTRONG: Why? It's supposedly a

12:42:04 10 matter of public record.

12:42:05 11 MR. FORD: I will explain it at sidebar.

12:42:09 12 THE COURT: What were you going to say

12:42:10 13 about the tweet?

12:42:12 14 MR. ARMSTRONG: The issue about what

12:42:13 15 someone else is doing, at best, if we're being the

12:42:18 16 most generous, goes to the weight of what we're

12:42:22 17 offering, Your Honor. And we're offering the

12:42:25 18 defendants' own words about what they're planning to

12:42:29 19 do and, in fact, do do over and over and over again.

12:42:33 20 The fact that they may joke and make a

12:42:36 21 stream of consciousness about someone else a little

12:42:39 22 bit later does not negate the purpose of why we are

12:42:41 23 offering it.

12:42:48 24 And if we're going to shave arguments

12:42:49 25 about weight as to every single exhibit, we'll be here

12:42:52 1 until December. We have to actually make some
12:42:55 2 rulings, respectfully, about statements being
12:42:57 3 non-hearsay and admissible.

12:43:00 4 MR. FORD: The argument we're making is
12:43:01 5 not about weight. The argument we're making is this
12:43:04 6 doesn't have to do with the 54. It doesn't even have
12:43:06 7 to do with a stock ticker. And with reference -- I
12:43:08 8 would just ask, again, if we could sidebar on the
12:43:11 9 issue of sealing the name of this individual.

12:43:17 10 THE COURT: Come up.

12:43:17 11 (The following proceedings held at sidebar.)

12:43:23 12 MR. FORD: He's -- one, he's one of my
12:43:27 13 clients.

12:43:28 14 Two, he's a former government informant
12:43:32 15 and agent who worked for many years who worked for the
12:43:35 16 FBI and SEC.

12:43:36 17 It's not a conflict issue. But, I mean,
12:43:39 18 it's in the public realm that he served as an
12:43:42 19 informant for many, many years for the FBI. That's
12:43:44 20 why I was just concerned about -- I don't want his
12:43:47 21 name appearing in the record, but they are -- that's
12:43:52 22 what they're saying.

12:43:52 23 MR. ARMSTRONG: For the record, I believe
12:43:52 24 he was charged with securities fraud as well.

12:43:55 25 MR. FORD: Well, I just said he was a

12:43:56 1 client of mine. He was arrested and served as an

12:43:56 2 FBI --

12:44:00 3 MR. ARMSTRONG: Sorry.

12:44:00 4 THE COURT: That goes without saying.

12:44:01 5 MR. FORD: That's the point. They're
12:44:03 6 aware of him being charged. If you join by, you know,
12:44:16 7 4 p.m. I'll give you a discount. These guys are
12:44:20 8 making fun of him, suggesting that what he's doing is
12:44:22 9 he's going to front load the followers. That's the
12:44:24 10 context. But it has nothing to do with the 54.

12:44:27 11 THE COURT: No. That's your
12:44:27 12 interpretation, though. But the government has a
12:44:30 13 different interpretation of him.

12:44:32 14 MR. FORD: But it has nothing to do
12:44:34 15 with -- look at the time period. There's not even any
12:44:36 16 substantive charges against my client in that time
12:44:39 17 period. It's before. And if it's relevant to the
12:44:42 18 conspiracy, then it should be limited to the 54.

12:44:46 19 So this conversation -- that was -- I just
12:44:48 20 wanted to sidebar. We can move this back out. We
12:44:51 21 don't have to have the argument up here, Your Honor.

12:44:53 22 THE COURT: Okay.

12:44:54 23 (The following proceedings held in open court.)

12:45:02 24 MR. DAVIS: I'm trying to understand all
12:45:04 25 this. I'm a big picture person. What I thought we

12:45:07 1 were dealing with were 54 stocks. And that's -- as a
12:45:11 2 trial lawyer, that's what I've prepared for. We can
12:45:14 3 get in the weeds of what all these texts say and
12:45:17 4 everything, but if they're not tethered to the 54
12:45:19 5 stocks, I don't think it's fair.

12:45:20 6 Now, I understand the Court's position as
12:45:24 7 well. How many of these texts are tethered to the 54
12:45:27 8 stocks and how many aren't. The government, frankly,
12:45:29 9 doesn't have an answer at this point. They'll
12:45:31 10 probably have to figure it out.

12:45:32 11 The second point the Court makes is, well,
12:45:33 12 why can't we just introduce general chatter that
12:45:36 13 doesn't have to do with some stock outside the 54. I
12:45:40 14 think that's really difficult. Because almost all
12:45:42 15 these chats are usually tethered to some kind of stock
12:45:45 16 at play. But assuming they're not, then you have a
12:45:52 17 miniature trial involving optional completeness and
12:45:52 18 bringing in the context of this conversation.

12:45:55 19 I mean, doesn't the government have this
12:45:57 20 evidence in the 54 they've charged? He said they say
12:45:59 21 over and over again here is what we're going to do.
12:46:01 22 Why do we need to go into this, then? It's just --

12:46:06 23 MR. ARMSTRONG: Your Honor --

12:46:08 24 MR. DAVIS: Oh, no. That's okay. I
12:46:08 25 just -- if I'm frustrated, it's because I really -- my

12:46:10 1 client and I really want to try this case and this is
12:46:13 2 what we've prepared for and not all these other
12:46:15 3 things.

12:46:15 4 And we have objected to them last week and
12:46:20 5 had a meet and confer. So we've made our position on
12:46:20 6 it.

12:46:24 7 Thank you, Judge.

12:46:24 8 MR. ARMSTRONG: Your Honor, just one last
12:46:24 9 point on this. This idea that people are supposedly
12:46:28 10 surprised by communications between and among
12:46:33 11 co-conspirators cannot be more farfetched. We
12:46:38 12 literally cite to some of these conversations in the
12:46:42 13 indictment.

12:46:43 14 So paragraph 17, we have Mr. Sabo talking
12:46:47 15 with Mr. Matlock about how the conspiracy is working
12:46:50 16 and why it's a problematic. That's paragraph 17.

12:46:53 17 So there's no surprise that conversations
12:46:56 18 like these are going to be actually at issue in this
12:47:00 19 case.

12:47:01 20 Paragraph 18, exact same thing.

12:47:04 21 Mr. Constantinescu and Mr. Matlock. We got to look
12:47:08 22 less obvious. It looks like we're front loading.

12:47:11 23 So this idea that somehow every
12:47:13 24 conversation had to be tethered to a 54-trial episode
12:47:16 25 is just a total fiction. And it is belied by the

12:47:20 1 indictment that has been on the record for a year and
12:47:23 2 a half at this point.

12:47:25 3 MR. DAVIS: Well, we're certainly able to
12:47:27 4 respond to what's in the indictment. The problem is
12:47:29 5 there's a whole heck of a lot more here that is way
12:47:32 6 beyond the indictment.

12:47:34 7 And so I just think that the Court should
12:47:41 8 limit them to the 54 that are involved here or I think
12:47:46 9 we face being in a very, very long trial and trying to
12:47:52 10 complete conversations for outside the 54 stocks that
12:47:56 11 I would expect wouldn't be necessary in this case,
12:47:58 12 because the government, I would hope, would have the
12:48:01 13 proof on the 54, if not the 19, so....

12:48:09 14 And as much as general due process.

12:48:11 15 MR. ROSEN: To me this just illustrates
12:48:12 16 the core of the problem is a lot of these
12:48:13 17 conversations have nothing to do with depriving
12:48:16 18 victims of money or property. I think if we dismiss
12:48:18 19 pursuant to *Ciminelli* and they reindict with actual
12:48:21 20 stocks that they can at least allege that they show
12:48:25 21 have deprived victims of money or property, we'll be
12:48:28 22 back here whenever with a much tighter, smaller case
12:48:32 23 where we know exactly what the evidence is. And
12:48:35 24 there'll be at least a cognizable crime on the horizon.

12:48:41 25 MR. ARMSTRONG: Your Honor, again, we can

12:48:44 1 go through it. Having these kinds of statements just
12:48:47 2 made in the abstract, not terribly helpful to anybody
12:48:49 3 because we actually have on our exhibit list
12:48:51 4 conversations between and among people like
12:48:54 5 Mr. Matlock and Mr. Sabo where they are talking about
12:48:58 6 Mr. Deel's and Mr. Cooperman's pump and dumps. They
12:49:02 7 use those exact words. And how those pump and dumps
12:49:06 8 break someone's account.

12:49:07 9 And we can wax all we want in the
12:49:08 10 abstract. When we go back to the record, we have the
12:49:10 11 proof to back it up. And we're trying to introduce
12:49:13 12 the defendants' own statements to prove that.

12:49:20 13 THE COURT: Needless to say, I'm a little
12:49:22 14 frustrated where we are right now. Let's take a lunch
12:49:25 15 break. Let's be back in about 45 minutes. I do want
12:49:29 16 to visit about something Mr. Rosen alluded to when we
12:49:33 17 get back, but let's come back in 45 minutes.

12:49:37 18 (Court in recess.)

13:57:21 19 THE COURT: All right. Be seated.

13:57:28 20 As I said earlier, I was going to, when we
13:57:32 21 came back, harken on to something Mr. Rosen had
13:57:37 22 brought up. Only it's not the exact issue you brought
13:57:39 23 up that I want to talk about, or I want you guys to
13:57:43 24 talk about.

13:57:45 25 Mr. Rosen, you said, Judge, you're out of

13:57:47 1 this box if you grant our motion to dismiss out of --
13:57:54 2 based on *Greenlaw*. I want to hear your argument. I
13:57:59 3 mean, you made your *Greenlaw* argument yesterday, I've
13:58:01 4 heard it. I want to hear your *Ciminelli* argument, or
13:58:07 5 from whomever else, and why the allegations here --
13:58:17 6 and, obviously, I expect Mr. Armstrong to come back
13:58:21 7 strong and say absolutely not -- why these aren't just
13:58:27 8 like what the Second Circuit got reversed on. You
13:58:31 9 know, the right for information.

13:58:34 10 MR. ROSEN: Right. *Ciminelli* ultimately
13:58:46 11 was about the right to perfect economic information or
13:58:50 12 even true economic information in making discretionary
13:58:54 13 economic determinations of what to do, what
13:58:57 14 transactions to enter into.

13:59:00 15 THE COURT: Which they put under umbrella
13:59:02 16 called right to control.

13:59:04 17 MR. ROSEN: The right to control.

13:59:05 18 Is that a traditional property right or
13:59:07 19 not? It was phrased under the property rights -- you
13:59:10 20 know, they went back and looked at wire fraud from its
13:59:12 21 inception and mail fraud from its inception and, you
13:59:15 22 know, made the determination that it only protects
13:59:17 23 traditional property rights. Money, sometimes
13:59:20 24 intellectual property, and things like that.

13:59:23 25 But what it doesn't do, it doesn't provide

13:59:25 1 an obligation for people to provide either their
13:59:30 2 listeners, the people that are decision-makers with
13:59:33 3 all the information that they need to make
13:59:35 4 discretionary economic decisions with their money.

13:59:37 5 And that's exactly what this case is.

13:59:40 6 That's how it was charged. They're talking about
13:59:42 7 false and misleading statements. But they're really
13:59:45 8 talking about omissions. You did not tell the Twitter
13:59:49 9 followers that you were selling stock when you were
13:59:51 10 buying.

13:59:51 11 And that's exactly what -- that's exactly
13:59:55 12 what *Ciminelli* was really about. It's a -- you know,
13:59:58 13 the fact is that people, to the extent -- you know,
14:00:03 14 they're, as we saw in the 302 reports, but also as
14:00:06 15 laid out in the indictment, people wanted to know what
14:00:08 16 are defendants -- what my defendant was doing, what
14:00:11 17 trades was he executing. And they just don't have the
14:00:14 18 right under the criminal laws to that economic
14:00:18 19 information. It's not a property right that they
14:00:20 20 have.

14:00:21 21 And it makes sense. You're a Twitter
14:00:23 22 follower. You have no connection with my client.
14:00:26 23 You're not paying him any money. He has no fiduciary
14:00:32 24 duty to you. He's tweeting out ideas about what
14:00:35 25 potentially you should invest in. And sure, of

14:00:36 1 course, you want more information. You want to be
14:00:38 2 able to track his buys and sells to the T because he's
14:00:46 3 making money. And that's fine. You -- that's
14:00:47 4 something you would want -- that's something I would
14:00:49 5 want.

14:00:51 6 It's just not a traditional property right
14:00:52 7 that is controlled. That the Supreme Court has deemed
14:00:57 8 false under the wire or mail fraud and securities
14:01:01 9 fraud statutes, too. Because 1348 is, you know,
14:01:04 10 fairly identical to wire, mail and bank fraud, as we
14:01:08 11 pointed out in our briefs.

14:01:09 12 Now, you sort of -- you know, how does
14:01:12 13 that differ from the traditional pump and dump? Well,
14:01:16 14 you know, you look at it two ways: *Greenlaw* is very
14:01:18 15 precise. Well, is lying enough? So let's accept the
14:01:22 16 government's theory that everything that they were
14:01:24 17 saying is a lie. And the answer is no. *Greenlaw* said
14:01:29 18 no. You have to have this intent to cheat, to deceive
14:01:33 19 people.

14:01:34 20 So even if the government is right that
14:01:36 21 what they were saying was not true, how do you prove
14:01:39 22 that someone was intending to deceive or cheat people?
14:01:43 23 Because they're intending to deceit people out of
14:01:46 24 money or property. And that's exactly what we don't
14:01:48 25 have here.

14:01:48 1 The indictment goes through every single
14:01:52 2 ticker. This is what these guys made from trading in
14:01:56 3 that stock. Garibotti: This is what they made from
14:01:59 4 trading in that stock.

14:02:01 5 There's no allegations that I'm aware
14:02:02 6 of -- and the government has effectively conceded
14:02:03 7 this -- that any of that came from victims. Who would
14:02:08 8 a victim -- I don't even know who a victim would be.
14:02:09 9 It would be a person who, I guess, bought a stock
14:02:14 10 solely based on their recommendations, disregarding
14:02:16 11 all the disclaimers.

14:02:18 12 The stock then, you know, they were
14:02:20 13 waiting around for someone to tell them personally
14:02:23 14 when to sell. Even though if you look at the
14:02:26 15 defendant's Twitter accounts, they don't tell people
14:02:29 16 when to sell. So they're waiting for this new
14:02:32 17 information that just is provided to them and their
14:02:34 18 followers about this one particular stock.

14:02:37 19 And then they didn't sell at the right
14:02:39 20 time. And then the stock didn't go back up after
14:02:42 21 maybe it had gone down. So all those things, those
14:02:45 22 stars have to align. And that's what they need to
14:02:50 23 prove.

14:02:50 24 That's why I'm saying, like, if you
14:02:52 25 dismiss it, I don't think they'll be able to allege

14:02:54 1 that they are actually victims who have lost money or
14:02:57 2 property here. They certainly probably lost that
14:03:04 3 discretionary economic decision-making power, but they
14:03:05 4 didn't lose money or property.

14:03:06 5 And the government will set up -- get up
14:03:08 6 here and, well, that's how it was alleged. You know,
14:03:09 7 we say money or property in the indictment and that's
14:03:11 8 fine. But, you know, I pointed out in our brief,
14:03:15 9 there's a case in the Eastern District of New York,
14:03:16 10 the *Nordlicht* case. And it doesn't matter exactly how
14:03:21 11 it's charged, what matters is the actual allegations
14:03:23 12 in indictment and what's shown.

14:03:26 13 And the Court said the only way this could
14:03:28 14 have made sense is that the defendants in that case
14:03:30 15 were deprived of economic -- the information to make
14:03:33 16 the best economic decision-makers. In this case,
14:03:36 17 information on when our clients were actually selling
14:03:39 18 their stock.

14:03:40 19 And that's all this case is about. That's
14:03:43 20 why -- that's what we're going to show, are defenses
14:03:47 21 about the deception, the cheating, the getting money
14:03:49 22 from these victims. And they can't show that. The
14:03:51 23 people that they've brought on -- and some of them I
14:03:54 24 feel like they weren't doing wise things with their
14:03:57 25 money, a lot of them -- like, they didn't look at when

14:04:00 1 the stock went up. They didn't look when -- you know,
14:04:02 2 when there were peaks or troughs or anything. They
14:04:05 3 just held on for like no apparent good reason, but not
14:04:09 4 due to our guys. Our guys weren't saying you should
14:04:11 5 hold on. Like, days or weeks had passed.

14:04:14 6 One guy, this weatherman from Boston, had
14:04:17 7 bought CEI in September of 2021. He would have -- if
14:04:23 8 he had -- the stock then went up significantly, not
14:04:25 9 due to -- I don't think due to any of these
14:04:28 10 defendants. My client's not really in that one. So I
14:04:31 11 don't know quite as well as the others.

14:04:32 12 But then there's a short -- so he would
14:04:35 13 have tripled his money if he had properly executed a
14:04:41 14 day trade. He didn't fine.

14:04:43 15 Then there was a short report issued by a
14:04:46 16 hedge fund, Carousel Capital, that completely tanked
14:04:51 17 the stock. And that's charged as one of the 54
14:04:53 18 episodes.

14:04:54 19 I just -- how could that possibly say that
14:04:56 20 our guys are the cause of his -- and then he held on
14:04:59 21 for the next two years. It's like, you know, and he's
14:05:03 22 a victim.

14:05:04 23 And there's no way they could ever prove
14:05:07 24 that our guys tweeting about it on one day or two
14:05:11 25 days, and then this massive short report that

14:05:13 1 completely destroyed the stock, but somehow yet our
14:05:17 2 guys took money and property from that guy. No. He
14:05:20 3 wanted -- it's the discretionary economic information.

14:05:22 4 In his case, it's that this rogue hedge
14:05:26 5 fund, which actually appears in the FINRA reports, was
14:05:29 6 short selling. And then while they were building this
14:05:32 7 short report and then dumped all their shares -- and
14:05:34 8 then repurchased all their shares back, when the
14:05:37 9 shares predictably tanked, but it's not just our guys.

14:05:42 10 And that's why it's -- I keep emphasizing
14:05:43 11 over and over again as a broken record, that's why
14:05:45 12 this is different from the traditional pump and dump.

14:05:47 13 In the traditional pump and dump, there's
14:05:49 14 a control group of people, control all those shares of
14:05:53 15 stock. There is no real company. Everything that
14:05:55 16 they do is a loss to other people. Once they stop
14:05:58 17 pumping, the music stops and the shares go from them,
14:06:03 18 you know, during the pump, held all by them, to these
14:06:07 19 people who are purchasing it based on false and
14:06:09 20 misleading information.

14:06:10 21 And then they just end. Because they're
14:06:12 22 like these microcap private reverse mergers into these
14:06:16 23 shell companies. There's nothing real about them. So
14:06:18 24 you can say easily, okay, there was a scheme to
14:06:21 25 deprive others -- victims of money or property.

14:06:25 1 Here, you just don't have that. And
14:06:26 2 that's why it's like -- this is such a novel case,
14:06:28 3 because frequently, you know, we built -- we built all
14:06:32 4 these charts up with our experts showing, like,
14:06:34 5 reactions to tweets up and down. It's like they
14:06:36 6 didn't control anything. They didn't control the
14:06:39 7 destiny of these stocks. Sometimes, you know, they're
14:06:41 8 saying that my client tweeted and then sold, yeah,
14:06:44 9 because the stock went down 20 cents and that was his
14:06:47 10 stop loss --

14:06:47 11 THE COURT: That may be factual --

14:06:47 12 MR. ROSEN: Right.

14:06:49 13 THE COURT: -- factually correct. But can
14:06:53 14 I look at that in the context of a motion to dismiss?

14:06:53 15 MR. ROSEN: Of course -- well, you -- the
14:07:00 16 key -- but what I'm talking about are the facts
14:07:02 17 surrounding the allegations in the indictment. The
14:07:04 18 facts are, as pled, we walked through GTT yesterday
14:07:08 19 and you walked through every one of those tickers.
14:07:10 20 They don't say people actually lost -- victims lost
14:07:14 21 money or property because of what our defendants did
14:07:17 22 or the -- or anything like that, false and misleading
14:07:20 23 statements. What they do tally up are profits made.

14:07:24 24 But what we just determined here this
14:07:25 25 morning is that these profits are not fraud proceeds,

14:07:30 1 which is why we eliminated that column in the
14:07:33 2 Garibotti chart, which is why the government hasn't
14:07:35 3 said --

14:07:36 4 THE COURT: Well, does it even matter if
14:07:37 5 they are?

14:07:39 6 MR. ROSEN: Well, yeah, because if they're
14:07:41 7 not -- if they're not, if they're just regular trading
14:07:45 8 proceeds, they're not proceeds from a victim. They're
14:07:48 9 not money obtained from that victim. It's just
14:07:50 10 trading proceeds.

14:07:51 11 THE COURT: So this is I guess the focus
14:07:54 12 of my question, because I'm getting back to, out of
14:07:59 13 *Ciminelli* into *Greenlaw*, I guess. I mean, it has to
14:08:04 14 deprive money or property -- and *Greenlaw* says from
14:08:06 15 the victim.

14:08:06 16 MR. ROSEN: From the victim. Exactly.

14:08:14 17 THE COURT: And so does any money come
14:08:15 18 from the victim here? Any victim?

14:08:16 19 MR. ROSEN: I haven't seen or I don't
14:08:18 20 think it's alleged that anybody obtained a single
14:08:21 21 dollar from what actually is a true victim. We filed
14:08:24 22 the materiality brief as part of our response --

14:08:30 23 THE COURT: I mean, one of the things
14:08:31 24 *Greenlaw* says -- and it's because it was kind of a --
14:08:35 25 for lack of a better term, a Ponzi scheme, the facts

14:08:40 1 were.

14:08:41 2 MR. ROSEN: Right.

14:08:41 3 THE COURT: Is that by -- the defendant
14:08:49 4 gaining money, the plaintiff necessarily -- or not
14:08:51 5 plaintiff, but the victim or investor necessarily lost
14:08:55 6 money. Is that true here?

14:08:59 7 MR. ROSEN: At the risk of being scolded,
14:09:02 8 Judge, and I hate quoting yourself back to you, it's
14:09:04 9 not a zero-sum game. It's just not. This is trading.
14:09:09 10 Stocks can go up.

14:09:10 11 And so if your -- even if they're -- even
14:09:13 12 if everything is correct, if a stock goes up and they
14:09:17 13 sell out, which is what happened in a lot of these
14:09:20 14 stocks, no one lost anything, as account of what they
14:09:24 15 did.

14:09:24 16 And that's why it's different from a
14:09:25 17 traditional Ponzi scheme. And that's why it's exactly
14:09:28 18 different from a traditional pump and dump. In a
14:09:30 19 traditional pump and dump, one person's gain is one
14:09:34 20 person's loss. In a Ponzi scheme, one person's gain
14:09:36 21 is one person's loss.

14:09:38 22 In an open market, with market trades
14:09:40 23 going back and forth amongst people, people making all
14:09:42 24 types of different discretionary economic decisions
14:09:45 25 and other issues being raised by people, press

14:09:49 1 releases, SEC reports, short sellers, you can't say
14:09:53 2 that. No one can say that. Which is why
14:09:59 3 Dr. Garibotti, as Mr. Ford said, for three-quarters of
14:10:01 4 a million dollars, hasn't been able to say that. It's
14:10:04 5 futile.

14:10:05 6 So that's why I'm saying, dismiss the
14:10:05 7 indictment. Let them prove that people, victims,
14:10:08 8 actually true victims, not people who think that they
14:10:11 9 are victims, not people who say I lost money in this
14:10:13 10 stock so therefore I'm a victim, like they're
14:10:15 11 expecting 1,000 batting average for every stock, which
14:10:19 12 even my client didn't get, nor did any of the others.
14:10:21 13 My client lost plenty of money on plenty of tickers
14:10:25 14 over plenty of months.

14:10:26 15 Let them allege that and let them prove
14:10:28 16 that in accordance with the law to show that a crime
14:10:30 17 has been committed. And that's why I'm confident that
14:10:33 18 once they actually have to do that --

14:10:37 19 THE COURT: And I'll let you finish and
14:10:40 20 then I'll let anybody else speak and then I'll ask
14:10:42 21 Mr. Armstrong or someone from the government to
14:10:43 22 address it, but you keep using the word "prove." And
14:10:49 23 in a dismissal stage, they don't really have to prove
14:10:54 24 it, do they? They just have to allege it.

14:10:57 25 MR. ROSEN: They have to allege it, but --

14:10:59 1 THE COURT: That's why the government --
14:10:59 2 and I don't think it's a secret -- they love that
14:11:01 3 statement by Mr. Knight.

14:11:05 4 MR. ROSEN: And Mr. Knight has pled guilty
14:11:07 5 because that was his intent. My client barely knew
14:11:11 6 Mr. Knight. Mr. Knight talking with people who
14:11:14 7 generally were not part of this conspiracy. You can't
14:11:17 8 allege an indictment based on completely inadmissible
14:11:20 9 evidence. I don't see how it's admissible against my
14:11:23 10 client, let alone some of these people. So that's
14:11:27 11 Mr. Knight.

14:11:28 12 And he's taken responsibility for what his
14:11:31 13 intent was. But my client, I know, did not cause
14:11:35 14 victims to lose money by what he was doing. It's
14:11:39 15 provable in the charts.

14:11:40 16 But, more importantly, all I do is I keep
14:11:42 17 looking back at that indictment. And instead of
14:11:45 18 saying this victim, because they bought based on X
14:11:50 19 tweet, they were expecting him to say when he sold.
14:11:53 20 He didn't say when he sold. They hold onto it because
14:11:56 21 of that. And then the stock went down because of
14:11:59 22 that. That they lost money. It doesn't.

14:12:01 23 All it says is that my clients gained
14:12:05 24 money. But in a nonzero-sum game, that's not enough.
14:12:09 25 They chose a speaking indictment in this case. That

14:12:12 1 was their decision. And when the allegations in that
14:12:16 2 indictment -- you can't just track the language, but
14:12:18 3 when the allegations in that indictment don't add up
14:12:21 4 to a crime, it has to be dismissed.

14:12:23 5 And here, it's like we're going to be
14:12:25 6 doing this -- we've gone through, what, five exhibits
14:12:27 7 today or something like that? Like we're going to be
14:12:29 8 doing this for months.

14:12:31 9 THE COURT: That's about five times more
14:12:32 10 than I would have counted.

14:12:34 11 MR. ROSEN: We've gone through, you know,
14:12:35 12 month -- we're going to be at this for months. And to
14:12:38 13 do that and then to hear -- either hear evidence or,
14:12:41 14 you know, get, you know, God forbid a conviction and
14:12:44 15 then, you know, an appeal and reversal, because what I
14:12:49 16 think it's on its face is insufficient under the new
14:12:53 17 Ciminelli law, which hadn't been -- which hadn't -- to
14:12:55 18 their defense, had not been handed down until then as
14:12:59 19 a valid reasoning in the Second Circuit, amongst other
14:13:04 20 circuits, I don't fault them for not alleging it.

14:13:06 21 But they have to allege it. And in this
14:13:07 22 case, it's not simply semantics. I remember -- you
14:13:10 23 talked about this yesterday of, oh, they'll just go
14:13:12 24 back and add a paragraph. But it's not that simple.
14:13:16 25 They have to make allegations in the grand jury and

14:13:18 1 add that to the speaking portion of these victims and
14:13:20 2 show precisely how they lost money. And they can't do
14:13:23 3 that.

14:13:25 4 And -- but even if they could, Judge,
14:13:28 5 based on what we've seen in the evidence, this case
14:13:31 6 would be so far narrower than what it is now, we won't
14:13:34 7 be talking about 54 or 397 or 25 or 35. We'll be
14:13:40 8 talking about two or three. Based on allegations that
14:13:43 9 we'll contest at trial.

14:13:44 10 But this case will be, you know, drowned
14:13:48 11 in that proverbial bathtub that people talk about.
14:13:51 12 And it will allow us to actually try a case rather
14:13:54 13 than simply going through exhibit after exhibit from
14:13:57 14 April 1st to June 15th.

14:14:00 15 THE COURT: Okay. Any other defendant
14:14:02 16 want to weigh in?

14:14:05 17 MR. FORD: I'll just speak very quickly.
14:14:12 18 To my knowledge, during the charged time
14:14:13 19 period, none of these defendants took a single dollar
14:14:16 20 from any of their followers or complainants. That in
14:14:19 21 and of itself can end the conversation.

14:14:27 22 And not only did they not take a single
14:14:28 23 dollar, it was not their intent to take a single
14:14:31 24 dollar. The way this works in practice, Your Honor,
14:14:33 25 is people set up paid chatrooms.

14:14:36 1 They then tell people, hey, I got the best
14:14:38 2 calls in the world. People give them extraordinary
14:14:42 3 amounts of money. It's in our exhibits. \$279 a month
14:14:46 4 and they come in and they tell you, buy Amazon stock
14:14:48 5 today or buy this stock today. That would be a way to
14:14:51 6 obtain money from your followers. My client never
14:14:54 7 asked for and never received a single dollar from
14:14:57 8 anyone.

14:14:58 9 To put this in the context of *Ciminelli*, I
14:15:05 10 view the facts, while disparate, as legally identical.
14:15:11 11 The reason is because, as I discussed yesterday, if we
14:15:17 12 go back to what actually happens in *Ciminelli* -- and I
14:15:18 13 know everybody knows the case well, we've been
14:15:21 14 studying it now for a long time, and studying these
14:15:24 15 concepts even before *Ciminelli* went to the Supreme
14:15:27 16 Court. And you can see it in other rulings we've got,
14:15:29 17 as I mentioned, such as *SEC v. Govil*, where a similar
14:15:33 18 issue was decided in the SEC context before -- argued
14:15:38 19 before *Ciminelli*.

14:15:39 20 What happens in that case is there is an
14:15:44 21 individual paying bribes to New York state officials
14:15:48 22 for the purpose of using money that's going to go to a
14:15:53 23 revitalization program for the city of Buffalo. The
14:15:58 24 government comes and brings a wire fraud claim and the
14:16:00 25 Supreme Court says wait a second. You knew what it

14:16:04 1 cost. It was going to be \$10 million to build this
14:16:07 2 new building in Buffalo. That was the bid. Whether
14:16:09 3 you gave it to company A, B, or C. It was all the
14:16:13 4 same.

14:16:13 5 What you're upset about is that had you
14:16:17 6 have known this additional information, that these
14:16:19 7 guys were paying kickbacks, you would have acted
14:16:21 8 differently. That's the concept in the non-abstract
14:16:24 9 form of what is meant by this.

14:16:30 10 Because in the United States we are
14:16:31 11 talking about only registered securities, there is no
14:16:33 12 point at which somebody is not cognizant or aware of
14:16:38 13 the market price of a stock at any given moment in
14:16:40 14 time. Which means that any of the followers, any of
14:16:47 15 the complainants who purchased the stock at the bona
14:16:50 16 fide market price and sold at the bona fide market
14:16:54 17 price, their sole complaint in this is that they would
14:16:59 18 have liked to have known when Edward Constantinescu
14:17:03 19 was selling.

14:17:04 20 And if you look at how much money this man
14:17:07 21 made on huge stocks like American Airlines and
14:17:12 22 Carnival Cruise Lines, I, too, wish I knew when he was
14:17:17 23 pressing the sell button. But it wasn't feasible to
14:17:20 24 develop an internet following on Twitter by telling
14:17:22 25 people when he was selling stocks.

14:17:25 1 He tried to find companies, not that he
14:17:28 2 loved or wanted to marry. He tried to find companies
14:17:30 3 that he thought society is going for this. Joe Biden,
14:17:35 4 our President, is getting on the television saying
14:17:37 5 carbon capture is the future. We're going to put
14:17:41 6 \$2 trillion into green energy and into carbon capture.

14:17:44 7 And my client's looking at it and saying
14:17:48 8 Caber Energy is the next new carbon capture company.
14:17:49 9 They just acquired Viking, who is going to do carbon
14:17:52 10 capture. I bet this is going to be a good one.

14:17:54 11 And it's not just my client. It's the
14:17:56 12 U.S. Department of Energy issuing reports on carbon
14:17:59 13 capture. It is tons of online news articles and
14:18:04 14 platforms issuing, you know, statements during this,
14:18:09 15 you know, purported green period where we're going to
14:18:11 16 change the economy.

14:18:11 17 My client has the foresight and the
14:18:15 18 brilliance, frankly, to say this stock could go. Not
14:18:18 19 because he has a political agenda or political motive
14:18:22 20 or even that he believes that this will be a long-term
14:18:25 21 success of the company. In his mind, he's saying this
14:18:28 22 is a good investment in the short term because this is
14:18:30 23 the flavor of the month.

14:18:32 24 Once he makes that realization, he says
14:18:35 25 there's something else I can do, which is I can help

14:18:38 1 other people learn how to do this. And so he puts it
14:18:40 2 on. And he puts it on his website with tweet after
14:18:46 3 tweet after tweet, giving the rules of the road. I
14:18:50 4 don't post my sells. I don't post my exits. If
14:18:52 5 you're not -- if you're unable to make money you paper
14:18:56 6 trade. Manage your own risk. If the stock is going
14:18:59 7 up, set a stop loss. If you are coming to me and
14:19:03 8 saying, hey, should I buy this stock, it's too late.
14:19:07 9 He tells you that. Don't chase. If the stock has
14:19:10 10 already gone up.

14:19:11 11 Now, what the government did is they found
14:19:13 12 a bunch of conversations, which it's ironic where my
14:19:17 13 client said buy on the dip. Sometimes even seems to,
14:19:21 14 like, through texting, yell at these other
14:19:23 15 individuals, what are you guys doing. Make sure --
14:19:25 16 you know, everything has got to happen on the dip.
14:19:27 17 What does that mean? Buy low, sell high. It's the
14:19:32 18 most fundamental economic principle and the foundation
14:19:34 19 of capitalism, going back to Adam Smith's writing.

14:19:37 20 He's not saying anything extraordinary
14:19:39 21 here. He's telling them, if you want to be successful
14:19:42 22 influencers like me, make sure that you are letting
14:19:44 23 people know when the stock is low. If you tell them
14:19:48 24 when it's high, they're more likely to lose money.

14:19:51 25 All of this goes back to the Ciminelli

14:19:54 1 issue, which is what is his intent. And is his intent
14:19:58 2 ever to obtain money from people. It's not alleged in
14:20:01 3 the indictment and it's not a feasible theory, because
14:20:06 4 he never takes money from anybody. What they are
14:20:07 5 upset about is they wanted to know how he traded
14:20:10 6 because they wanted to make millions of dollars and
14:20:13 7 have fancy cars and women like the one we saw in
14:20:18 8 Mexico, that's what they wanted.

14:20:20 9 I mean, look, you know, at the time he
14:20:24 10 went through a divorce and you could hardly blame him.
14:20:26 11 You know, I have a son, so I might do something
14:20:28 12 different. But if I made \$50 million on stocks in two
14:20:31 13 months, even with a son, I'd probably buy a pretty
14:20:35 14 nice car. You know, but his actions weren't out of
14:20:37 15 the ordinary, but they were all done lawfully. The
14:20:40 16 overwhelming majority of his profits were off of
14:20:43 17 stocks that I can assure you, you will recognize.
14:20:46 18 They're big names.

14:20:46 19 He made -- you know, for example, right
14:20:48 20 around this time period, \$4 million. I think in a
14:20:52 21 day-and-a-half on Tesla stock. He just was good at
14:20:55 22 this.

14:20:56 23 Under -- what we're asking, and it's on
14:21:01 24 behalf of the entire group, is for dismissal of the
14:21:04 25 indictment for failure to allege that any of these

14:21:07 1 individuals ever intended to obtain money from
14:21:09 2 anybody.

14:21:10 3 Having now sat through --

14:21:12 4 THE COURT: Let me stop you there, because
14:21:14 5 let me preview what the government's going to say.
14:21:16 6 The government's going to say we've alleged intent.
14:21:20 7 And we have Mr. Knight, who we think is a
14:21:23 8 co-conspirator with you guys, saying we intended to
14:21:26 9 rob these people.

14:21:28 10 And at least at one point in the
14:21:30 11 indictment I think there is language that you intended
14:21:34 12 to maximize your profits, often at the expense of the
14:21:41 13 victims, is I think the way they say it, but it's
14:21:44 14 something like that. I'm paraphrasing.

14:21:48 15 MR. FORD: Well --

14:21:48 16 THE COURT: And my question is, isn't that
14:21:50 17 enough? Or is it not enough?

14:21:52 18 MR. FORD: The answer is no, it's not
14:21:55 19 enough. And part one of that, with regards to the
14:21:58 20 fact-specific issue with Dan Knight, I mean, look,
14:22:01 21 they're not alleging the crime of robbery. So we'll
14:22:03 22 get that out of our mind.

14:22:05 23 As we've heard, none of these defendants
14:22:07 24 were in the room. And, in fact, he was speaking to a
14:22:09 25 different group of people all together. The only

14:22:11 1 individual in the room who is also on this indictment
14:22:14 2 is Tommy Cooperman, who audibly disagrees with what
14:22:18 3 Dan Knight is saying and points out that people are
14:22:20 4 actually making money on GTT.

14:22:22 5 Now, what Dan Knight was talking about, I
14:22:23 6 don't know. But we did go back and were able to find
14:22:26 7 on Wayback multiple tweets that we are willing to
14:22:28 8 share with the Court where Dan Knight uses this
14:22:32 9 language in regards to the other co-defendants. He
14:22:35 10 says he's robbing them. He uses it in regards to
14:22:38 11 hedge funds.

14:22:38 12 These are all factual issues. I don't
14:22:40 13 know why he was saying what he was saying. But this
14:22:44 14 bleeds into the second part of your question, which is
14:22:47 15 the theory itself is not tenable, either in the
14:22:52 16 indictment or otherwise as alleged. Even if they say
14:22:57 17 at the expense of, it is insufficient to show an
14:23:02 18 intent to obtain money or property from them because
14:23:06 19 they can't. It is not feasible. The marketplace
14:23:10 20 doesn't operate that way. At all times all buys and
14:23:14 21 sells were bona fide and at the prevailing market
14:23:19 22 rates.

14:23:19 23 The only thing that the government is
14:23:24 24 alleging was at the expense of was the lack of
14:23:27 25 information regarding when these very successful men

14:23:30 1 sold their stocks. Because they wanted to be like
14:23:33 2 them and they wanted to make as much money.

14:23:36 3 We tried give them the rules of the road.
14:23:38 4 Our clients tried to give them the rules of the road
14:23:41 5 in the tweets. They did what they could. But at the
14:23:45 6 end of the day, even if the government is making some
14:23:49 7 suggestion that, you know, there was -- you know,
14:23:56 8 deprivation of information, which is what they were
14:23:58 9 saying, they have failed to allege that. And so it is
14:24:04 10 why we're seeking dismissal of this case.

14:24:08 11 THE COURT: Mr. Reyes?

14:24:10 12 MR. REYES: Your Honor, I'll be brief.

14:24:19 13 This has been an exercise in putting a
14:24:22 14 square peg in a round hole since the beginning. And
14:24:26 15 what Mr. Rosen said is absolutely true.

14:24:28 16 First of all, in a traditional pump and
14:24:30 17 dump -- and Mr. Ford -- in a traditional pump and
14:24:36 18 dump, the victim, as soon as they buy, they're buying
14:24:41 19 something that's not worth what it's said to be worth.
14:24:45 20 The stock has been manipulated.

14:24:47 21 That's absolutely not the case in this
14:24:50 22 matter and it hasn't -- and the prosecution has said
14:24:53 23 that they are not going to try and show causation.

14:24:57 24 If you can't show the causation that the
14:25:00 25 stock price was somehow manipulated, then the buyers,

14:25:05 1 when they bought a \$4 stock, it was worth \$4. They
14:25:09 2 had a certificate that said it's worth \$4. What they
14:25:12 3 did after that -- and, of course, a lot of market
14:25:15 4 influences -- is not the defendants' responsibility.

14:25:21 5 Now, I will say this, Your Honor. To the
14:25:25 6 extent that they're alleging a causation argument --
14:25:29 7 excuse me -- they are saying they're not, but they
14:25:32 8 kind of are, it changes the dynamics of this case
14:25:36 9 tremendously. Because it is hand in hand with
14:25:40 10 deprivation. If they're not going to show causation
14:25:42 11 and the stock price was the stock price, then they
14:25:46 12 can't show a deprivation.

14:25:47 13 So I just wanted to emphasize that for the
14:25:50 14 Court.

14:25:51 15 I will also say this: The traditional
14:25:56 16 pump and dump is a scenario where the perpetrators
14:26:01 17 don't really engage in a lot of risk. It's
14:26:03 18 manipulation. That is absolutely not the case with
14:26:07 19 our guys. Every time they woke up in the morning and
14:26:09 20 read the news and made their decisions, they were
14:26:11 21 engaging in the same amount of risk as anyone on the
14:26:13 22 risk.

14:26:13 23 They didn't sell to anyone directly. It's
14:26:15 24 not the wolf of Wall Street where they're on the phone
14:26:18 25 selling to the victims. It was the market. And the

14:26:22 1 individuals who bought this stock had not -- were not
14:26:24 2 deprived of anything. It was worth \$4. They could
14:26:27 3 give it to someone else, it was worth \$4 then. And
14:26:30 4 the deprivation of property did not occur. Not as a
14:26:33 5 result of any manipulation, which they've abandoned.

14:26:37 6 So I just wanted to emphasize that for the
14:26:39 7 Court.

14:26:39 8 We'd also join the defendants and say the
14:26:43 9 proper route here would be to dismiss this -- because
14:26:47 10 it is a defective indictment -- and avoid having to go
14:26:51 11 through a whole long trial only to be back here some
14:26:55 12 time later.

14:26:56 13 Thank you, Your Honor.

14:26:58 14 THE COURT: All right. Any other
14:26:59 15 defendant want to weigh in?

14:27:02 16 Mr. Armstrong, you want to answer that?

14:27:05 17 MR. ARMSTRONG: Sure, Your Honor.

14:27:07 18 Your Honor, can you please tell me how
14:27:08 19 want me to proceed? I'm happy to just talk -- if you
14:27:12 20 ask specific questions, I'm happy to answer those as
14:27:12 21 well, so --

14:27:15 22 THE COURT: Yeah. Well --

14:27:15 23 MR. ARMSTRONG: Yeah. What's up?

14:27:16 24 THE COURT: -- here's the part I'm most
14:27:19 25 interested in.

14:27:20 1 Yesterday I think it was me that said
14:27:26 2 isn't it true that whatever these defendants did or
14:27:29 3 didn't do, if they'd have done it and stayed off
14:27:34 4 social media, they'd have been okay. And I think your
14:27:37 5 answer was yes.

14:27:39 6 And so if that's the case, what they're
14:27:45 7 really being prosecuted for is the combination of
14:27:52 8 statements they made, which the government, perhaps
14:27:59 9 justifiably, thinks were not totally truthful, but the
14:28:05 10 real thing they're being prosecuted is statements they
14:28:08 11 didn't make like, oh, by the way we're selling.

14:28:13 12 And how is that different from *Ciminelli*?
14:28:16 13 I mean, that's what I'm -- I mean, *Ciminelli* says,
14:28:20 14 lack of information -- again, I'm paraphrasing the
14:28:24 15 Supreme Court here -- but lack of information is not a
14:28:26 16 property right. And as such, it's not actionable
14:28:30 17 under securities fraud or wire fraud, either one.

14:28:34 18 MR. ARMSTRONG: Okay. So a few things,
14:28:34 19 Your Honor.

14:28:35 20 Number one, we would push back on the
14:28:38 21 contention that this is an omissions case. That's not
14:28:42 22 what we have alleged. In paragraph 13 of the
14:28:49 23 indictment, of the superseding indictment, we talk
14:28:51 24 about -- at length about how the defendants hoisted
14:28:56 25 upon their followers a whole bunch of false and

14:29:00 1 misleading information and false and misleading
14:29:03 2 tweets. And we categorize them.

14:29:05 3 THE COURT: And deceit is half the
14:29:06 4 equation. I agree.

14:29:07 5 MR. ARMSTRONG: Yes.

14:29:08 6 THE COURT: It's the other half I'm
14:29:10 7 worried about.

14:29:12 8 MR. ARMSTRONG: Yeah. And so just the
14:29:12 9 idea that this is an omissions case, is just flatly
14:29:15 10 contradicted by, number one, the allegations in the
14:29:18 11 superseding indictment, but, number two, what our
14:29:20 12 trial proof is going to be as well. So that's number
14:29:23 13 one.

14:29:24 14 Number two is that -- I think Your Honor
14:29:26 15 knows this, this is Black Letter Law -- allegations in
14:29:29 16 an indictment have to be taken as true. And we allege
14:29:35 17 to the hilt in 35-plus pages how the defendants used
14:29:42 18 false and misleading information to fraudulently
14:29:45 19 induce others to buy stocks at their detriment.

14:29:49 20 And so the crux of *Ciminelli* is that
14:29:53 21 intent. That deceptive intent to obtain money or
14:29:59 22 property. And there is no doubt that that was their
14:30:03 23 intent. They wanted other people to depart with their
14:30:07 24 money and buy a stock so they could then benefit.

14:30:11 25 THE COURT: What do I do with *Greenlaw*

14:30:13 1 that says money or property from the victim?

14:30:18 2 MR. ARMSTRONG: So I think that we have
14:30:20 3 that also alleged in the indictment. It's the
14:30:23 4 followers issue. I think that we put as part of our
14:30:27 5 jury instruction that it doesn't have to be a specific
14:30:29 6 person. There has to be a victim contemplated. And
14:30:32 7 we allege that there a victim contemplated here. In
14:30:36 8 this case, as we allege and as we're going to prove,
14:30:38 9 the contemplated victim is the followers.

14:30:47 10 THE COURT: Does it matter that some of
14:30:48 11 the followers made money?

14:30:51 12 MR. ARMSTRONG: Again, Your Honor, where
14:30:52 13 are we in the case? We are looking at the indictment
14:30:57 14 as alleged is true. And you cannot go beyond the four
14:31:00 15 corners of the indictment on the motion to dismiss
14:31:04 16 stage. There is no summary judgment.

14:31:05 17 THE COURT: I'm with you on that. I'm
14:31:06 18 with you on that. That's one of the reasons I was
14:31:07 19 asking Mr. Rosen what I was asking.

14:31:10 20 But doesn't -- I guess -- and I guess I'm
14:31:17 21 going to repeat myself here. How do I get away from
14:31:21 22 the fact that this whole case is about the conveyance
14:31:26 23 or non-conveyance of information and how does that
14:31:32 24 differ from what *Ciminelli* was about? I mean,
14:31:35 25 *Ciminelli*, they had a fraud and kickback scheme going

14:31:39 1 and they didn't tell anybody about it.

14:31:42 2 MR. ARMSTRONG: Yeah, Your Honor, I don't
14:31:43 3 pretend to have a monopoly on all the answers, and so
14:31:46 4 I think Mr. Liolos has something he wants to add,
14:31:49 5 so...

14:31:49 6 THE COURT: Well, you can add. I'm
14:31:49 7 willing to hear from anybody.

14:31:49 8 MR. LIOLOS: Thank you, Judge.

14:31:50 9 Yeah. In *Ciminelli*, they were trying to
14:31:52 10 get them to give them the contract. Here, they're
14:31:56 11 trying to get them to buy the shares to get the money,
14:31:58 12 right. So *Ciminelli* is a contract for labor. It's
14:32:01 13 not cash coming out of their brokerage accounts. And
14:32:05 14 it's the intent, over and over again, as alleged in
14:32:08 15 the indictment, that they were trying to induce people
14:32:09 16 to part with their money to their detriment.

14:32:13 17 THE COURT: The people that were departing
14:32:14 18 with money in *Ciminelli* were the State of New York,
14:32:18 19 that rebuilding program. The real victims in
14:32:21 20 *Ciminelli* were, I mean, if you're asking me to analyze
14:32:25 21 it, would be the other bidders that didn't pay the
14:32:28 22 kickback that didn't have a chance of getting the
14:32:32 23 contract because they didn't pay the kickback.

14:32:36 24 MR. LIOLOS: Indeed. And it was inducing
14:32:37 25 them to depart with the contract, not with their cash

14:32:40 1 as the followers were here.

14:32:43 2 The intent of the post was to induce
14:32:46 3 people to depart with their money. To buy the shares
14:32:49 4 to the detriment of the followers and the benefit of
14:32:52 5 the defendants. That's what we've alleged.

14:32:54 6 And it's also helpful context that
14:32:57 7 *Ciminelli* went all the way through trial. And the
14:33:01 8 government, the entire time only relied on a right to
14:33:03 9 control theory all the way through its trial evidence
14:33:05 10 as well.

14:33:06 11 So while we're just looking at the four
14:33:08 12 corners of the indictment, I expect that if this was
14:33:10 13 in a similar posture of *Ciminelli*, it would be
14:33:13 14 significantly expanded by the trial evidence here.

14:33:19 15 THE COURT: Well, what -- help me there in
14:33:20 16 *Greenlaw* then, which obviously it's Fifth Circuit
14:33:24 17 case, I'm bound by it. The reason they found or were
14:33:32 18 looking at the loss from the victim in terms of the
14:33:37 19 gains from the defendant was because it was, as I
14:33:41 20 called it yesterday, a zero-sum game or whatever. I
14:33:44 21 think the Fifth Circuit said it was the flip side of
14:33:48 22 the same coin; that, you know, for you to gain a
14:33:52 23 dollar, I had to lose a dollar.

14:33:56 24 But that's not true here, is it?

14:33:58 25 MR. ARMSTRONG: So, Your Honor, I think

14:33:59 1 that -- to Mr. Liolos's point, we have a government
14:34:02 2 exhibit from Mr. Matlock's own words that says just
14:34:05 3 that. And we're happy to pull it up and show Your
14:34:08 4 Honor.

14:34:08 5 THE COURT: Just tell me what it says.

14:34:10 6 MR. ARMSTRONG: Ms. Kim, if you could
14:34:12 7 please pull up Government Exhibit 146, please.

14:34:34 8 This is a post from Mr. Matlock on the
14:34:36 9 Atlas Trading Discord floor in the heart of the
14:34:39 10 conspiracy. The last line is most critical one on
14:34:41 11 October 21, 2021, he says: One other thing where do
14:34:46 12 you think the money you make trading comes from? It
14:34:48 13 doesn't just come from nowhere. Doesn't matter if
14:34:51 14 you're trading Tesla or CEI. If you made a single
14:34:55 15 dollar, it came from someone else's trading account.

14:34:58 16 So that is a zero-sum game in the trial
14:35:01 17 evidence and in Mr. Matlock's own words.

14:35:07 18 MR. REYES: Your Honor, may I address
14:35:08 19 that?

14:35:08 20 THE COURT: Wait till he's done.

14:35:11 21 MR. REYES: Sorry. Go ahead.

14:35:11 22 MR. ARMSTRONG: And so I think that that
14:35:12 23 should alleviate Your Honor's concerns that when we
14:35:14 24 allege that they were fraudulently inducing people to
14:35:17 25 part with their money or property, by buying stocks,

14:35:20 1 they were doing it, number one, to benefit themselves.
14:35:24 2 And they were doing it, number two, in a zero-sum game
14:35:27 3 that Mr. Matlock describes in his own words during the
14:35:31 4 conspiracy.

14:35:31 5 THE COURT: Okay. Now you can speak.

14:35:33 6 MR. REYES: Thank you, Your Honor.

14:35:33 7 Your Honor, what he's describing there is
14:35:35 8 how the stock market works. This is the same if it's
14:35:39 9 IBM or Amazon or Whole Foods.

14:35:44 10 At the end of the day, if you have -- if
14:35:46 11 you sell something and you get money, it comes from
14:35:49 12 somewhere. There's a finite amount of stock and a
14:35:52 13 finite amount of money. He's not saying the person --

14:35:54 14 THE COURT: Whose side are you on?

14:35:58 15 MR. REYES: No, no. But here, let me
14:35:59 16 finish. He's not saying that the person doesn't get
14:36:01 17 something in return for buying the stock. It does
14:36:04 18 come from somebody's account, not directly to
14:36:06 19 Mr. Matlock. There's a whole middle ground. But the
14:36:10 20 market works itself out if you sell something and it's
14:36:12 21 bought. But the person who buys the stock gets the
14:36:17 22 price of oil for that amount. And that stock could
14:36:22 23 very well go up.

14:36:23 24 If you take this to its logical
14:36:26 25 conclusion, then anyone who ever buys a stock and then

14:36:28 1 sells it is taking money from someone's account, and
14:36:31 2 that's actually true, right. I mean, it's a finite
14:36:34 3 amount of stock. But you're not taking it, you're
14:36:37 4 buying it. They're getting something in return. And
14:36:40 5 they're getting the stock. A stock that, in many
14:36:42 6 cases in these cases, for example, go straight up.

14:36:44 7 So Mr. Matlock was simply illustrating the
14:36:51 8 fact that when you buy something in the market, that's
14:36:52 9 a finite amount of shares, anyone who has ever traded
14:36:55 10 on the stock exchange, in order to leave the market
14:36:58 11 with more money, it came from somewhere. But that
14:37:03 12 somewhere receives something in return. Equity. And
14:37:06 13 that equity could rise in value or go down in value.

14:37:09 14 So this is not a statement of anything
14:37:11 15 nefarious whatsoever. And it certainly doesn't have
14:37:14 16 anything to do with intent.

14:37:18 17 THE COURT: Mr. Rosen, you're standing
14:37:21 18 there. Find a microphone.

14:37:23 19 MR. ROSEN: I just keep going through the
14:37:26 20 indictment. And I just fail to see where they allege
14:37:30 21 that money and property came from the victim. It
14:37:33 22 doesn't say --

14:37:34 23 MR. LIOLOS: Paragraph 12.

14:37:35 24 MR. ROSEN: It doesn't say it in the
14:37:37 25 charge. It doesn't give any specific examples. The

14:37:40 1 purpose of the scheme is laid out as part of the
14:37:42 2 conspiracy, that it's a scheme to enrich themselves
14:37:46 3 and not to obtain -- there's nothing about obtaining
14:37:48 4 money from a victim or anything like that.

14:37:51 5 And I think what -- you know, what
14:37:53 6 Mr. Armstrong pointed out to is exactly what happened.
14:37:57 7 Is that people understand that in the stock market
14:38:00 8 you're obviously getting money from someone. But
14:38:02 9 that's not illegal. The illegality is from the
14:38:05 10 victim.

14:38:06 11 *Greenlaw* was about money obtained from
14:38:08 12 a -- directly as a result of a private placement
14:38:11 13 memorandum. Victims were giving money directly to
14:38:14 14 the -- to the defendants. That's obviously a scheme
14:38:19 15 to obtain money and property from a victim by means of
14:38:21 16 fraud.

14:38:22 17 The stock market, where we have no proof
14:38:25 18 that there was any artificial inflation of anything,
14:38:27 19 and Dr. Garibotti can't even say a single dollar arose
14:38:31 20 from fraud, that obviously did not happen. It's
14:38:34 21 simply counterparties trading in a national market.
14:38:38 22 The defendants made money. But who cares. That's not
14:38:40 23 the issue. Enriching themselves is not the issue.

14:38:43 24 The issue has to be obtaining money and
14:38:44 25 property from the victim. And there is no out --

14:38:48 1 specific allegations at all in this indictment. And
14:38:51 2 the government is not prejudiced. They can go --
14:38:53 3 we're not asking them to dismiss with prejudice.

14:38:55 4 They can go back and reallege it. We can
14:38:58 5 narrow this case significantly and we can proceed if
14:39:01 6 they find the proof. If they can allege and find
14:39:04 7 these victims, these, you know, we believe are
14:39:08 8 unicorns but they believe are everyday people, we'll
14:39:09 9 have a battle over that.

14:39:11 10 But we need that battle. We can't just
14:39:12 11 have it over money and property. It doesn't matter
14:39:14 12 that they obtained money and property. It has to come
14:39:16 13 from that victim.

14:39:18 14 MR. ARMSTRONG: Again, Your Honor, these
14:39:20 15 are fantastic arguments that go to maybe the weight of
14:39:24 16 the evidence. It goes to maybe are the allegations
14:39:27 17 true or not. Maybe is there a counterargument you
14:39:31 18 could make. Sure.

14:39:33 19 But at the stage that we're at now, where
14:39:36 20 we have alleged that they did this in paragraph 12 at
14:39:39 21 the expense of their followers, and we have the
14:39:42 22 specific allegations that they were robbing idiots for
14:39:45 23 their money, those allegations have to be taken as
14:39:48 24 true at this stage. And we're going to back it up
14:39:51 25 with other trial evidence. We're going to back it up

14:39:53 1 with tons of trial evidence that I hope we can show
14:39:56 2 Your Honor and then show the jury, because it is
14:39:58 3 compelling and it is powerful and it proves all of the
14:40:00 4 points that we're talking about today.

14:40:02 5 MR. FORD: Your Honor, if I may. On
14:40:04 6 *Greenlaw* -- which I talked about *Ciminelli* and how
14:40:08 7 elucidating the facts are here.

14:40:13 8 In *Greenlaw*, those individuals were
14:40:15 9 issuing what are called private placement memorandum
14:40:19 10 or offering memorandum. It is when insiders of a
14:40:21 11 company accept money in exchange for an ownership
14:40:23 12 interest of that entity. It can be a limited
14:40:26 13 partnership, it could be an LLC, or it could come in
14:40:30 14 the form of stock.

14:40:34 15 So the reason that the Fifth Circuit
14:40:34 16 reaches the conclusion that it does in *Greenlaw* is
14:40:37 17 because those individuals were, through their
14:40:39 18 misleading or deceptive statements, actually obtaining
14:40:42 19 money in exchange for partnership interest in the five
14:40:46 20 partnerships.

14:40:46 21 Again, those facts are absent from the
14:40:49 22 indictment as allegations. They're absent from the
14:40:52 23 facts or the showing. They do not fit the paradigm
14:40:56 24 that they are purporting to allege, which is you
14:40:58 25 didn't disclose when you sold and people would have

14:41:00 1 liked to have known that because they would have sold
14:41:02 2 as well.

14:41:03 3 To the contrary. We're reiterating what
14:41:08 4 Mr. Reyes pointed out. Everything was purchased at
14:41:11 5 bona fide market price. Everything was sold at bona
14:41:15 6 fide market price through an anonymous market
14:41:19 7 mechanism.

14:41:24 8 We can discuss the issue further. While
14:41:29 9 there may be a disagreement among the group as to
14:41:32 10 whether dismissal with prejudice or without prejudice
14:41:35 11 is appropriate. If Your Honor is inclined to ask
14:41:39 12 questions about it, we will answer from our
14:41:43 13 perspective and where we're sitting.

14:41:45 14 There's no evidence in these 330 exhibits
14:41:47 15 and there's nothing alleged in the indictment that
14:41:50 16 Mr. Constantinescu ever took a dollar from anybody.
14:41:55 17 So it seems like a futile endeavor. But we do
14:42:00 18 understand dismissal is the right remedy here.

14:42:05 19 Referring to me, personally, I dealt with
14:42:07 20 it in the Govil case. And in that case, the Court --
14:42:11 21 the Second Circuit found, in no uncertain terms, that
14:42:15 22 my client in that case had lied, but there weren't
14:42:19 23 victims because there wasn't a finding that they had,
14:42:22 24 you know, actually lost money.

14:42:24 25 But, again, we were in the context of an

14:42:25 1 offering memorandum where the money went directly to
14:42:29 2 the individual. It had nothing to do with private
14:42:32 3 placement.

14:42:32 4 With regard to the *Nordlicht* case,
14:42:38 5 *Nordlicht*, N-O-R-D-L-I-C-H-T, which Mr. Rosen
14:42:40 6 referenced, I also happen to represent the chief
14:42:42 7 financial officer, Joe Sanfilippo, who was acquitted
14:42:46 8 on all charges.

14:42:46 9 What happened and what Judge Cogan, who is
14:42:50 10 really one of the finest judges in the Eastern
14:42:53 11 District, what happened is we wound up spending -- it
14:42:55 12 was a three-month long trial only to get a directed
14:42:58 13 verdict at the end. It went up to the Second Circuit
14:43:02 14 on appeal. It bounced back and forth. My client was
14:43:04 15 acquitted, Mr. Levy was not.

14:43:07 16 But at the end of the day, when it came to
14:43:10 17 sentencing for Mr. Levy, Judge Cogan found there was
14:43:14 18 no harm or loss and he was sentenced to a nominal
14:43:18 19 fine. And that's where things stand with that case.
14:43:20 20 It's up on appeal. It started back in, you know,
14:43:23 21 2017, I believe.

14:43:24 22 So we've seen this happen with courts.
14:43:28 23 This is an instance of overreaching by the government.
14:43:32 24 It's something that was raised by Ms. Cordova very
14:43:34 25 early on. The Supreme Court of the United States has

14:43:37 1 become sensitized to it. The Second Circuit, who led
14:43:40 2 the charge and invented the right to control theory,
14:43:42 3 has backed off of it. The Fifth Circuit in *Greenlaw*
14:43:45 4 has identified it.

14:43:46 5 And we are now here at risk of spending
14:43:49 6 months of our lives on a trial that is a dead end.
14:43:52 7 This indictment as it stands, the allegations are
14:43:55 8 insufficient. It needs to be dismissed.

14:44:02 9 MR. WILLIAMS: I'd like to briefly speak
14:44:04 10 to the indictment.

14:44:05 11 Judge, the indictment does not try to
14:44:07 12 trace money from any victim to any defendant. It
14:44:09 13 doesn't allege it, it doesn't try it. And a quote in
14:44:12 14 an indictment cannot substitute for an actual
14:44:14 15 allegation. They have to say the magic words and this
14:44:17 16 indictment fails to do that. So it's defective.

14:44:20 17 THE COURT: Did they profit from the
14:44:22 18 expense of their followers or victims? That's not
14:44:27 19 saying they got money from their --

14:44:31 20 MR. WILLIAMS: I don't believe so, Your
14:44:32 21 Honor. I believe the indictment is defective on its
14:44:34 22 face. And they have to go back to a grand jury and a
14:44:36 23 grand jury may ultimately find probable cause to that,
14:44:40 24 but that's not an appropriate consideration today as
14:44:42 25 to whether this particular indictment is defective.

14:44:45 1 It doesn't even try to trace and say that these people
14:44:48 2 lost money because of these acts. And that's the key
14:44:52 3 element that's missing under the case law Your Honor's
14:44:55 4 been discussing.

14:44:56 5 They have to say the magic words and they
14:44:58 6 just haven't done it, so it's defective and should be
14:45:01 7 dismissed. That's all I have.

14:45:03 8 THE COURT: All right, counselors. Let me
14:45:06 9 tell you what I'm going to do here, since we made so
14:45:09 10 much progress this morning.

14:45:11 11 I'm going to do one of two things: I'm
14:45:15 12 going to go back and draft an order dismissing the
14:45:20 13 case; or I'm going to go back and draft an order on
14:45:23 14 optional completeness and how we're going to handle
14:45:26 15 all the social media posts and try to get it out this
14:45:30 16 afternoon.

14:45:31 17 Obviously, if it's the latter of the two,
14:45:34 18 I expect you guys here at 9:00 in the morning. If
14:45:37 19 it's the former, I don't expect you here at 9:00 in
14:45:41 20 the morning. And I cannot promise you what time I
14:45:48 21 will get that out.

14:45:51 22 But having said I'll do one of those two
14:45:54 23 things, I'm not going to get you a copy of what I
14:45:56 24 think the charge is going to be today because I'm
14:45:58 25 going to be busy doing that.

14:46:01 1 All right. We'll stand adjourned. Thank
14:46:03 2 y'all.

3 (Court in recess.)
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CERTIFICATE

I hereby certify that pursuant to Title 28, Section 753 United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings in the above matter.

Certified on March 21, 2024.

/s/ Nichole Forrest
Nichole Forrest, RDR, CRR, CRC

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